TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 772

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

vs.

THE EXCESS INSURANCE COMPANY OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1941.

CERTIORARI GRANTED JANUARY 5, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 2223

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, Appellant,

vs.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, deceased, and Walter C. Young, Appellees

STATEMENT OF POINTS—Filed October 25, 1940

The plaintiff-appellant intends to appeal from the decision of the United States District Court for the District of Kansas, entered in the above case on July 1, 1940, wherein the court ordered the dismissal of plaintiff-appellant's complaint for a declaratory judgment and has designated as the basis for its appeal the complete record and all the proceedings and evidence had therein.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas. Paul R. Stinson, 201 First National Bank Building, Kansas City, Missouri. Dick H. Woods, 201 First National Bank Building, Kansas City, Missouri, Attorneys for Plaintiff-Appellant.

Service of a copy of the within statement of points is hereby acknowledged this 24 day of October, 1940.

Clarence C. Chilcott, 918 Scarritt Building, Kansas City, Missouri. Ratner, McAllister & Mattox, Parsons, Kansas. Attorneys for Defendants-Appellees.

[File endorsement omitted.]

[fol. 2] DESIGNATION OF CONTENTS OF THE RECORD ON APPEAL—Filed October 25, 1940

To the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit:

Pursuant to the provisions of Rule 13 (1) of the United States Circuit Court of Appeals for the Tenth Circuit, and

Rule 75 of the Federal Rules of Civil Procedure, appellant, the Excess Insurance Company of America, designates the following portions of the record, proceedings and evidence in the above-entitled cause to be contained in the record on review:

The complete record and all the proceedings and evidence in the above cause, to wit:

1. Docket entries of all proceedings before the United States District Court for the District of Kansas.

2. Plaintiff's complaint.

3. The marshal's return, showing service on defendant Brillhart.

4. Defendants' motion to dismiss.

5. Transcript of all proceedings at hearing of July 1, 1940.

6. District Court's judgment and order of dismissal entered July 1, 1940.

7. Notice of appeal, together with date of filing.

8. The appeal bond.

9. This designation of the contents of the record.

10. Statement of points.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Tenth Circuit.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas. Paul R. Stinson, 201 First National Bank Building, Kansas City, Missouri. Dick H. Woods, 201 First National Bank Building, Kansas City, Missouri. Attorneys for Plaintiff-Appellant.

[fol. 3] Service of a copy of the foregoing designation of contents of record on appeal is hereby acknowledged this 24 day of October, 1940.

Clarence C. Chilcott, 918 Scarritt Building, Kansas City, Missouri. Ratner, McAllister & Mattox, Parsons, Kansas. Attorneys for Defendants-Appellees.

[File endorsement omitted.]

[Caption omitted.]

[fol. 4] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, THIRD DIVISION

Civil

No. 1185

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, Plaintiff,

vs.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, Deceased, and Walter C. Young, Defendants

DOCKET ENTRIES

Apr. 10, 1940—Complaint filed.
Apr. 10, 1940—Summons issued and furnished Marshal together with copies of the Complaint to be served upon Defendants.
Apr. 25, 1940—Application to Show Cause why Temporary Injunction should not issue against Deft.
Apr. 25, 1940—Order to Show Cause why Temporary Injunction should not issue against defts. filed and ent. J. H. 60 (Hopkins).
Apr. 26, 1940—Summons returned, Executed by service on Dewey Brillhart by leaving a copy of Complaint and Summons with Mrs. Minnie. Brillhart, wife. Walter C. Young deft. died Aug. 2, 1939. (Marshal's costs 7.95.)
Apr. 29, 1940—Copy of Order to Show Cause Returned by Marshal Executed by Service on Dewey Brillhart (Marshal costs 4.50).
[fol. 5] May 2, 1940—Stipulation to transfer case for trial at Kansas City, Kansas filed.
May 22, 1940—Case set for trial Kansas City, Kans. 11:00 A. M. June 5, 1940.
May 23, 1940—Affidavits on behalf of Dick Woods and W. B. Wise filed.
June 6, 1940—Motion to Dismiss filed by Deft. Brillhart.
June 7, 1940—Notice of Hearing to be held in Kansas City together with Application for Default Judgment against Dewey Brillhart.
June 27, 1940—Motion to Dismiss and Answer filed (Letter 6-27-40).

June 27, 1940—Suggestions Supporting Motion to Dismiss filed.
July 10, 1940—Reply Brief of Defendants filed.
July 29, 1940—Brief for Plaintiff filed.
July 29, 1940—Order of Dismissal assessing costs against plaintiff filed and entered J. H. 96 (Hopkins).
July 29, 1940—Certified copy Order of Dismissal to Judge Louis R. Gates.
July 29, 1940—Certified copy Order of Dismissal to Ratner & McAllister.
Aug. 1, 1940—J. S. 9 to Topeka.
Aug. 28, 1940—Notice of Appeal filed and copy mailed to attys (Ratner & McAllister and Clarence Chilcott) for deft.
Aug. 28, 1940—Appeal Bond in am't of $250.00 filed.
Sept. 7, 1940—Statement of Points filed.
Sept. 7, 1940—Designation of Contents of the Record on Review filed.
Sept. 7, 1940—Transcript of Proceeding of July 1, 1940 filed.
Oct. 1940—Transcript of Record on Appeal mailed to Hon. Howard F. McCue, Clerk at Topeka, Kansas.

[fol. 6] Bill of Complaint for Declaratory Judgment and Other Relief—Filed April 10, 1940

Comes now the plaintiff and alleges and shows:

1. Plaintiff is an insurance corporation, formerly organized and existing under the laws of the State of New Jersey, now organized and existing under the laws of the State of New York, with its principal office and place of business in the City, County and State of New York, and is a citizen and resident of the State of New York. Defendants Dewey Brillhart and Walter C. Young are citizens and residents of the State of Kansas, and of the District of Kansas.

This is a suit of a civil nature between the plaintiff on the one side and the defendants on the other, both of the defendants being citizens and residents of states other than that of plaintiff; and the amount in controversy (as

hereinafter more fully shown) exceeds the sum and value of $3,000, exclusive of interest and costs.

2. Henry G. Miller, receiver, is the duly appointed, qualified and acting receiver of Central Mutual Insurance Company of Chicago, Illinois, and of all of its properties and assets, said company having been organized and having existed as an insurance corporation under the laws of the State of Illinois.

3. In the year 1932, plaintiff and said Central Mutual Insurance Company of Chicago, Illinois entered into a written contract whereby, in consideration of certain premiums to be paid by Central to plaintiff and of other covenants of Central to plaintiff in said contract provided, plaintiff, subject to the terms and conditions of the contract, agreed to re-insure Central as respects certain third party automobile public liability policies thereafter to be issued by Central and becoming effective while said contract was in force. By the terms of said contract, plaintiff agreed to repay to Central any amounts of ultimate net loss which Central should pay in cash in excess of the first $5,000 on account of any one person injured or killed and in excess of the first $10,000 on account of more than one person injured or killed in any one accident, provided, however, that the obligation of plaintiff should not exceed $145,000 on account of one person injured or killed, or $240,000 for two or more persons killed or injured in any one accident.

[fol. 7] That said excess reinsurance contract contained, among others, the following provisions ("Central" being referred to in said contract as "the Company"):

"Section II. The term 'ultimate net loss' shall be understood to mean and shall mean the sum actually paid in cash in settlement of losses for which the Company is liable, after making proper deductions for all recoveries, salvages and other reinsurances or insurances, and shall exclude all expenses for salaried employees incurred in investigation, adjustment and litigation. Other loss and legal expenses, including court costs, incurred with the consent of the Reinsurer shall be apportioned in proportion to the respective interests as finally determined.

"Section III. The liability of the Reinsurer shall commence simultaneously with that of the Company and shall be subject in all respects to all the general and special

stipulations, clauses, waivers and modifications of the original policy or other undertaking and any endorsements or riders thereon.

* * * * * * *

"Section V. The Company shall file with the Reinsurer a specimen copy of each policy form issued by the Company and reinsured hereunder and the Company shall furnish amendments thereto as and when changes are made.

* * * * * * *

"Section IX. The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. Such notice shall be given to the Reinsurer on Preliminary Loss Advice on forms as per copy attached, and when final settlement is made the Reinsurer shall advise on Final Loss Advice on forms as per copy attached.

"The Reinsurer shall have the right and opportunity to associate with the Company in the defense and control of any claim or suit or proceeding relative to an accident where the claim or suit involves this reinsurance."

[fol. 8] Said contract was signed by plaintiff in the City, County and State of New York and by Central in the City of Chicago, in the State of Illinois, was delivered to Central and became effective either in the State of Illinois or State of New York and the premiums thereon were paid by Central to plaintiff either in the State of Illinois or the State of New York, and the agreement is either an Illinois or a New York contract, is not a Missouri or Kansas contract, and is not governed or to be interpreted by the laws of the State of Missouri or the State of Kansas.

4. Cooper-Jarrett, Inc., is and was at all times mentioned herein a motor freight carrier engaged for hire in the transportation of freight by motor vehicles in the various states of the Union, carrying its freight, among other places, from Kansas City, Missouri to the State of New York, and operating either its own motor vehicles or leasing or hiring the motor vehicles of others.

5. While the said contract or agreement of reinsurance was in force, and in January, 1934, said Central Mutual Insurance Company of Chicago, Illinois, issued its public

liability policy to Cooper-Jarrett, Inc., whereby in consideration of certain premiums therein agreed to be paid by Cooper-Jarrett, Inc. to Central, the latter, for the period from January 30, 1934 to January 30, 1935, and subject to the terms and conditions of said policy, agreed to insure Cooper-Jarrett, Inc. against loss from liability imposed by law upon Cooper-Jarrett, Inc. for damages on account of bodily injuries, including death resulting therefrom accidentally suffered or alleged to have been suffered by any person or persons through the ownership, maintenance or operation of any automobile described in the schedule in said policies, provided said injuries or death occurred within the period of said policy. The policy further provided that Central's limit of liability on account of one person so injured or killed should be $5,000.00 and, subject to the same limit for each person, its total liability on account of any one accident was $35,000.

Subsequent to the execution of said policy and by riders thereto attached in February, 1934, Central by "Hired Car Endorsements" agreed that said policies should cover the operation of automobiles and trailers of the type stated in the policies which were or should be hired by Cooper-[fol. 9] Jarrett, Inc. during the terms thereof and used for the purposes stated in the declarations of said policies.

Another rider attached in March, 1934, provided:

"In consideration of an additional premium of $13.13, it is understood and agreed that the limit of Liability for Personal Injury for One Person is increased to $10,000.00 instead of as originally written."

6. In October, 1934, an accident occurred in the State of Ohio in which a truck owned or leased by Cooper-Jarrett, Inc. was involved, and in which the defendant Brillhart's decedent was killed and the defendant Young was or claims to have been injured. Following these accidents two suits were filed in the Circuit Court of Jackson County, Missouri, at Independence, against Cooper-Jarrett, Inc., by the two individual defendants herein, charging that the injuries and death above described were the result of negligence on the part of Cooper-Jarrett, Inc., the death case being brought under the wrongful death statutes of Ohio. In both of these suits default judgments have been obtained against Cooper-

Jarrett, Inc., under circumstances hereinafter to be shown, the dates of filing, the amounts sought and the amount of recoveries in the two cases being as follows:

Style of Case	Amount of Recovery Sought	Date of Filing	Date and Amount of Judgment
Dewey Brillhart, administrator of the Estate of James Dwight Brillhart, deceased, vs. Cooper-Jarrett, Inc.	$25,000	12-4-35	April 22, 1939 $20,000
Walter C. Young, vs. Cooper-Jarrett, Inc.	10,000	4-23-36	April 22, 1939 $10,000

7. When these suits were filed Central refused to take over their defense upon the ground that the death and injuries alleged to have been sustained were not covered by the terms of the policy, whereupon Cooper-Jarrett, Inc. took over their defense, employed counsel, and filed answers in each case traversing the allegations of the respective [fol. 10] petitions. On January 11, 1937, Central being hopelessly insolvent, the Circuit Court of Cook County, Illinois, having jurisdiction in the premises, entered an order providing for the liquidation of said company and appointing a receiver of all of its properties. On January 21, 1937, said court, by order, restrained and enjoined all parties from bringing, prosecuting or maintaining any action against Central. On February 1, 1937, said court, by order, instructed the receiver not to continue or assume the defense of any suits upon which Central had previously had outstanding liability policies, and ordered all parties having claims or demands against the estate of Central to present their claims in said court. Cooper-Jarrett, Inc. and the two individual defendants herein were, as plaintiff is informed and believes, duly advised of said orders and proceedings. Thereafter, the Illinois court, by order and on due notice, fixed a time limit within which claims could be filed against the estate of Central and provided that all claims not filed within that time should be forever barred. Neither the individual defendants herein nor

Cooper-Jarrett, Inc. have ever filed any claims in the receivership in Chicago, and there is no longer any liability on Central or its receiver under Central's primary policy.

On May 14, 1937, Cooper-Jarrett, Inc. filed its petition in the District Court of the United States for the Western Division of the Western District of Missouri for reorganization under the provisions of Section 77B of the Federal Bankruptcy Act. That court, approving said petition, entered a general order providing for the filing of claims against the debtor in that court, pursuant to which both of the individual defendants herein filed their claims for the same amounts, respectively, sought in the two suits in the Circuit Court of Jackson County, Missouri. On September 30, 1937, the attorneys employed by Cooper-Jarrett, Inc. to defend the two state court suits against said Cooper-Jarrett withdrew, no counsel were substituted in their place, and from and after that time Cooper-Jarrett, Inc. was wholly without legal representation, and neither of said suits was longer defended. On April 1, 1939, in the 77B reorganization proceeding, the District Court of the United States for the Western Division of the Western District of Missouri, on ex parte application therefor reciting that Cooper-Jarrett, Inc. had "insurance," made an order permitting Brillhart, administrator, and Young to prosecute their actions in the state court. Sometime after the entry [fol. 11] of the aforesaid orders, Brillhart, administrator, and Young withdrew their claims in the 77B proceedings, and on April 1, 1939, in the final decree of the 77B court in said proceeding the debtor, Cooper-Jarrett, Inc. was fully and finally discharged from any claim or judgment that had been obtained or might be obtained by the defendant Brillhart, administrator, and the defendant Young.

8. Following the default judgments against Cooper-Jarrett, Inc. and on June 20, 1939, the defendants Brillhart and Young attempted to serve, notwithstanding the existing orders of the Circuit Court of Cook County, Illinois, summonses in garnishment on execution upon Central, by delivering copies thereof to the Chief Clerk of the Superintendent of Insurance of the State of Missouri. Following said attempted service and on September 15, 1939, interrogatories to Central, as garnishee, were filed in the Jackson County Circuit Court at Independence, and on January 26, 1940, no answers to the interrogatories in the Young

case having been filed, the Circuit Court of Jackson County at Independence entered its interlocutory judgment in favor of Young and against Central, as garnishee, in the amount of $10,450, and ordered said sum to be paid into court within ten days. On February 9, 1940, the said sum of $10,450 not having been paid into court pursuant to the order of the interlocutory judgment, the Circuit Court of Jackson County at Independence entered its final judgment in favor of Young and against Central in the amount of $10,450. No interlocutory judgment or final judgment has been entered in the Brillhart case.

10. Notwithstanding the existing orders of the Circuit Court of Cook County, Illinois, on January 18, 1940, the defendants Young and Brillhart attempted to serve additional summonses in garnishment upon Central as the garnishee of Cooper-Jarrett, Inc., through the Sheriff of Cole County, Missouri, by delivering copies thereof to F. P. Sizer, Deputy Superintendent of Insurance of the State of Missouri. Said summonses were returnable to the March, 1940, Term of the Circuit Court of Jackson County, Missouri, and on March 11, 1940, interrogatories were filed in the defendant Brillhart's case. No interrogatories under the second summons in garnishment have been filed in the defendant Young's case.

[fol. 12] 11. Neither Cooper-Jarrett, Inc., nor Central, nor its receiver, have ever paid out anything to the individual defendants herein, either on their claims or their purported judgments.

12. An actual bona fide, justiciable controversy has arisen and exists between the plaintiff on the one side and the defendants on the other in that—

(a) Plaintiff contends that the reinsuring agreement between it and Central is a pure contract of excess reinsurance, in which plaintiff's only obligation is to indemnify Central, as in the contract provided, against loss for sums actually paid in cash in settlement of losses for which Central was liable; and that therefore plaintiff never became and is not obligated to either of the defendants, in any sum whatever.

(b) The judgment creditor defendants herein contend that the contract between plaintiff and Central is one of

insurance against liability rather than of indemnity against loss; and that both under the contract and also by virtue of the provisions of Sections 5898 and 5899, R. S. Mo. 1929, plaintiff is obligated to Central or its receiver, to Cooper-Jarrett, Inc., and to each of the defendant judgment creditors herein, for all sums in each of the default judgments against Cooper-Jarrett, Inc., within the limits of the primary policy, and beyond the first $5,000 of each judgment, notwithstanding no payments on said judgments have been made either by Cooper-Jarrett, Inc. or Central or by its receiver, and notwithstanding both Cooper-Jarrett, Inc. and Central and its receiver have been fully discharged from all liability to these judgment creditors.

(c) Plaintiff contends that Sections 5898 and 5899, R. S. Mo. 1929, do not apply to reinsuring agreements, that even if they did that they do not apply to its agreement with Central, the contract being an Illinois or New York agreement and not governed by Missouri law; and that in no event is it liable either under its contract with Central or under the law, to the judgment creditor defendants herein or to Cooper-Jarrett, Inc., there being no privity between them. Plaintiff also contends that even if its agreement with Central was one of insurance against liability, that it is not indebted to either of the defendants, since Central, its receiver, and Cooper-Jarrett, Inc. have themselves been [fol. 13] fully discharged from all liability on the claims and judgments of Young and Brillhart.

13. Plaintiff is informed and believes and therefore alleges, that under the facts there was no liability on the part of Cooper-Jarrett, Inc., to either the defendant Brillhart or Young; that even if any liability existed, that the amounts of the recoveries in each of the default judgments were far in excess of the actual loss or damage sustained by the respective plaintiffs in the State court action, or the amounts which they would have recovered had the causes been defended; that each of the persons injured or killed in the accident was at the time an employee of Cooper-Jarrett, Inc. within the meaning of the Ohio Workmen's Compensation Law, where the accident occurred, and the Missouri Workmen's Compensation Law, where they were employed, and their claims were covered by and limited to those arising under Workmen's Compensation Law, and were not within the coverage of Central's primary policy,

which did not include Workmen's Compensation claims; and that if these facts had been developed in the garnishment proceedings against Central there would have been no judgment against the garnishee, in the Young case.

Plaintiff was never advised by Central either of the accident or of the filing of the suits, and it was not aware of the pendency of the suits against Cooper-Jarrett or Central until it received a letter from Mr. Frank P. Barker, attorney for Cooper-Jarrett, Inc., in the reorganization proceedings in February of 1939. Plaintiff further states that in the reinsuring agreement Central was at least impliedly obligated in good faith to provide adequate defense against all claims and suits in which the recoveries sought against Central's assureds were in amounts which might involve plaintiff in obligation under the reinsuring agreement, and that by reason of Central's failure to defend those suits, as well as its failure to notify plaintiff of the accidents and of the pendency of these suits, as required by Section IX of the reinsuring agreement, plaintiff was relieved and released of any and all obligation, as to these claims and suits, even if such obligation otherwise existed. Plaintiff further states that on abandonment of the defense of the suits by Central and notice thereof to Cooper-Jarrett, Inc., it became the duty of Cooper-Jarrett, Inc., itself to pro-
[fol. 14] vide and maintain in good faith an adequate defense against said claims and not to permit the entry of default judgments against it, by reason of which Central was released from any obligation under its primary policy, and plaintiff was released of all obligation, if any otherwise existed, under its agreement.

Moreover, plaintiff was not and is not bound as against any of the defendants herein by any of the default judgments hereinbefore mentioned, for the reason that it was neither a party to any of the proceedings leading up to them nor notified of their pendency, and that for plaintiff to be so bound, in such circumstances, would deprive it of its property without the due process of law guaranteed to it by Article XIV, Section 1, of the Amendments to the Constitution of the United States.

14. The judgment against Central as garnishee in the Young case was coram non judice and void and its entry was in effect a denial by the Missouri State Court of the full faith and credit accorded by Article IV, Section 1, of

the Constitution of the United States to the existing judgments, orders and proceedings in the Circuit Court of Cook County, Illinois, in this: That the Illinois receivership proceeding was a statutory receivership for the winding up and dissolution of Central in the state of its being, in which the Illinois court lawfully took unto itself exclusive jurisdiction of Central's property and of all claims and demands against it, and in which proceeding the Illinois court had enjoined and forbidden the further prosecution of any claim against Central; and in which proceeding, under Illinois law, the receiver succeeded to the title of Central's assets, and which proceeding effected the dissolution of Central as a corporation long prior to the time of the attempted service of summonses in garnishment against Central in the Missouri cases.

15. The defendants and each of them have been and are threatening to attempt enforcement of their asserted claims against this plaintiff by proceedings to be instituted against plaintiff upon the basis of pretended judgments against Cooper-Jarrett, Inc. and Central. And all of the steps already taken by them in procuring the pretended default judgments against Cooper-Jarrett, Inc. and in attempting to procure default judgments against Central have been for that sole purpose, both Cooper-Jarrett, Inc. and Central [fol. 15] and its receiver having long since been discharged from all obligations upon the claims of these defendants.

And while defendants have not as yet actually demanded of plaintiff the payment of any part of these judgments, nevertheless a present justiciable controversy exists between plaintiff and these defendants as to whether plaintiff is so obligated and defendants are, by the acts heretofore asserted, committed and threatened, proceeding to lay the foundation for asserting their claims against the plaintiff, and plaintiff's rights in the premises are in present and immediate jeopardy.

16. Both the individual defendants herein, as judgment creditors of Cooper-Jarrett, Inc., are asserting and claiming the right to recover from plaintiff the amount of each of their judgments in excess of $5,000, through the process of the Missouri state court in which they were entered, all as heretofore shown, notwithstanding neither Cooper-Jarrett, Inc. nor Central nor its receiver has paid anything on them and notwithstanding they have been relieved and

released from all liability. Plaintiff's only contractual relationship was with and its only contractual obligation was to Central. If it is liable at all to anyone, plaintiff does not know and needs the protection of the single decree of this court, to which all of the claimants and interested parties are parties, adjudging whether that obligation, if any, is due to the receiver of Central, to Cooper-Jarrett, Inc., or to the individual judgment creditor defendants herein, without which plaintiff stands exposed to the hazard of and threatened with the continuation and the institution of a multiplicity of suits, which will not only subject plaintiff to great and unnecessary expense but also to the hazard of being compelled again to pay to the defendants herein the same amounts previously paid to Cooper-Jarrett, Inc. and/or others.

17. The default judgments against Cooper-Jarrett, Inc. and Central were obtained under circumstances amounting to legal fraud upon the courts which entered them. While plaintiff disclaims any intentional wrong on the part of anyone, nevertheless, in none of the proceedings resulting in these judgments, were the courts entering them advised in the evidence submitted, of the reinsuring agreement, of the fact that plaintiff had not been notified of the pendency of these cases, or that plaintiff, under its contract with Central had the right to appear and defend them. Moreover, after [fol. 16] the withdrawal of counsel for Cooper-Jarrett, Inc. in the two suits, no efforts whatever were made by counsel for Cooper-Jarrett, Inc. further to defend said suits, and said default judgments were suffered to be entered without Cooper-Jarrett, Inc. being represented by counsel at all. Nor in the garnishment proceedings against Central was or is Central represented by counsel, nor was the court entering said judgment advised in the evidence before it of the fact that orders of the Illinois court were in effect enjoining the prosecution of such proceedings or that Central had previously been dissolved as a corporation. And for the judgment creditor defendants herein to recover from plaintiff upon the basis of the default judgments against Cooper-Jarrett, Inc. and Central would not only be unconscionable, inequitable and unjust, but would also be tantamount to an abuse of the process of the courts, and would in effect actually deprive plaintiff of the due process of law guaranteed to it by the XIVth Amendment, Section 1 thereof, to the Constitution of the United States.

18. The defendants, Brillhart and Young, are pressing and prosecuting their claims against plaintiff through the processes of legal and equitable garnishments on their default judgments, on the claim and premise that the judgments are valid and conclusive as against plaintiff and that plaintiff is indebted both to Central and Cooper-Jarrett under the reinsuring agreement, and also to them, under said agreement and under the law.

Save and except the actual merits of the claim of each of the respective judgment creditor defendants herein, all of the questions, legal and equitable, presented by this complaint, are common to both of the defendants, which questions can be settled with more facility and ease in one equitable proceeding and with advantage not only to plaintiff but to the defendants, as well. Moreover in the respective garnishment proceedings, threatened and now being pressed, the returns of the Sheriff on the garnishment summonses directed to Central and to the plaintiff cannot in those proceedings, be inquired into as to the facts recited in said returns, as fully as may be in this equitable proceeding; and in these respects also, plaintiff is without adequate remedy except in this cause.

[fol. 17] 19. Plaintiff further states that if the respective judgment creditor defendants herein are allowed to proceed in the threatened or pending garnishment proceedings, or in other proceedings, in the state court, and unless their attorneys and agents are restrained and enjoined from such action by a temporary injunction issued by this court, that plaintiff, will or likely will, suffer irreparable loss and damage to its property and to its rights, and the full efficacy of any judgment and decree entered in this court, in this cause will be threatened and impaired.

Wherefore, plaintiff prays that this court take and assume jurisdiction of this suit, of the subject-matter hereof, and of the controversies herein presented; that it will, by its orders, judgments and decrees, fully and finally determine and settle all of said controversies, all of the rights and legal relations of the parties hereto with, for and/or against each other and among themselves concerning said controversies; enjoin and forever restrain the defendants, and each of them, from further maintaining or prosecuting all or any of the Missouri state court proceedings mentioned herein, and from instituting any other actions or proceed-

ings of like character in any other court, or from questioning or challenging the proceedings and/or any decree entered herein; and that in the meantime this court make an order upon each of the defendants herein, their attorneys and agents, requiring them to appear before this court on a date in said order named and show cause, if any they have, why a temporary injunction should not issue; and for such other and further relief as the court may deem equitable and just.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas. Paul R. Stinson, 201 First National Bank Bldg., Kansas City, Missouri. Dick H. Woods, 201 First National Bank Bldg., Kansas City, Missouri.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

SUMMONS—Filed April 26, 1940

To the above named Defendants:

You are hereby summoned and required to file in the Clerk's office at Fort Scott, Kansas, and serve upon Ryland, Stinson, Mag & Thompson, plaintiff's attorney, whose address is Kansas City, Missouri, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Howard F. McCue, Clerk of the Court, by Alice L. Seelye, Deputy Clerk. (Seal.)

Date: April 10, 1940.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 19th day of April, 1940, I received the within summons at Ft. Scott, Kansas, and executed same as follows to wit: By delivering at the Dewey Brillhart with an adult member of the family, namely Dewey Brillhart with an adult member of the family, named

Mrs. Minnie Brillhart (wife) a true and certified copy thereof, near Mapleton, Kansas on April 19th, 1940.

Walter C. Young died on August 2nd, 1939 at Iola Kansas. This information was obtained from a daughter a Mrs. Folk at LaHarpe, Kansas, on April 19th, 1940.

William M. Lindsay, United States Marshal, by Repps H. Campbell, Deputy United States Marshal.

Marshal's Fees	
Travel	$5.95
Service	2.00
	$ 7.95

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

Motion to Dismiss and Answer—Filed June 27, 1940

MOTION TO DISMISS

Comes now Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, and moves the court to make an order dismissing the Complaint herein for declaratory judgment on the following grounds, to-wit:

1. Because all matters and issues involved herein are involved in and fully determinable by the garnishment proceedings already pending and in progress on a judgment in the state court of Missouri at the time that the action herein for declaratory relief was commenced.

2. Because under the allegations of plaintiff's complaint a proper cause for declaratory relief is not stated or shown, and the court should exercise its judicial discretion not to entertain said suit:

(a) Because plaintiff herein is merely attempting to have the court anticipate and decide issues involved and fully determinable in proceedings already pending and in progress in the Circuit Court of Jackson County, Missouri, at Independence;

(b) Because the plaintiff herein is attempting to remove a cause from a state court into a Federal Court contrary to the provisions of the removal act;

(c) Because the plaintiff herein is merely attempting to have this court act as a court of appeals and review the proceedings had in the Circuit Court of Jackson County, Missouri, at Independence;

(d) Because the plaintiff is attempting to remove a cause from the Circuit Court of Jackson County, Missouri, to the Federal Court for the District of Kansas in violation of the removal act as such cause could only be removed to the Federal Court for the Western Division of the Western District of Missouri.

3. Because a declaratory judgment will not finally settle and dispose of the alleged controversy between plaintiff and this defendant concerning the question of the liability of the plaintiff under the policy as garnishment proceedings are pending in three other cases, identical with the one herein, in the Circuit Court of Jackson County, Missouri, [fol. 20] and adjudication by declaratory judgment herein would be merely deciding the question piecemeal.

4. Because the co-defendant herein, Walter C. Young, died before the institution of this action for a declaratory judgment, and his administrator, Carlton R. Benton, Public Administrator of Jackson County, Missouri, is a non-resident of this judicial district and beyond the reach of process of this court and a multiplicity of suits will therefore not be avoided by the rendition of a declaratory judgment herein.

5. Because all of the parties interested, namely, Carlton R. Benton, Administrator of the Estate of Ralph Russell Phillips, deceased, Rex Phillips, Cooper-Jarrett, Inc., and Central Mutual Insurance Company of Chicago, Illinois, are necessary parties to a complete and final determination of the plaintiff's rights in the premises and are not made parties to this suit.

6. Because plaintiff's complaint and its affidavit filed in support thereof show on their face that plaintiff is not entitled to any relief against this defendant in this or any other court.

7. Because plaintiff's action for declaratory relief grows out of and is based upon written contract or policy of con-

current insurance, co-insurance, joint insurance or reinsurance, and plaintiff has failed to set the same out, or a true copy thereof as an exhibit or otherwise, in order that the court may be fully advised in regard thereto.

8. Because plaintiff's action for declaratory relief grows out of and is founded in part upon a written contract or policy of liability insurance issued by plaintiff's reassured and reinsured by plaintiff or concurrently insured, co-insured or jointly insured by plaintiff, but plaintiff fails to set the same out, or a true copy thereof as an exhibit, or otherwise.

ANSWER

1. Comes now the defendant and alleges that plaintiff's bill of complaint herein for declaratory judgment does not state facts sufficient to entitle plaintiff to the relief prayed.

2. Further answering, defendant admits the allegations contained in Sections 1, 2, 4, 5, 6, 8, 10, 11, Sub-section (b) [fol. 21] of Section 12, first paragraph of Section 15, and the first paragraph of Section 18; alleges that he is without knowledge or information sufficient to form a belief as to the trust of the allegations contained in Sections 3, 7 and 14, and denies the allegations of paragraphs (a) and (b) of Section 12, Section 13, the second paragraph of Section 15, Sections 16, 17, the second paragraph of Section 18 and Section 19 of plaintiff's bill of complaint.

3. Further answering, defendant alleges that the plaintiff, at all the times mentioned in these proceedings, was a foreign corporation duly licensed and authorized to do business as such in the state of Missouri and in compliance with the insurance laws thereof had appointed the Superintendent of Insurance of the State of Missouri as its agent for service of process upon it in all actions in this state; that during the year 1932 plaintiff executed and delivered to the Central Mutual Insurance Company of Chicago, Illinois, a contract, treaty or policy of insurance, reinsurance, excess insurance or joint insurance, by the terms of which, among other things, it agreed to insure, reinsure, jointly insure, concurrently insure and co-insure said Central Mutual Insurance Company of Chicago, Illinois, its assureds, and all persons or corporations to whom said Central Mutual might thereafter issue policies of public liability insurance, having a cause of action arising out of opera-

tions of said assureds as public and common carriers, and to become liable simultaneously, concurrently and coextensively with the said Central Mutual upon all third party liability insurance policies which said Central Mutual might thereafter issue to other persons, firms or corporations; that, thereafter, and in January, 1934, while said contract, treaty or policy was in full force and effect the said Central Mutual Insurance Company of Chicago, Illinois; issued a contract or policy of liability insurance to said Cooper-Jarrett, Inc., a corporation, said policy being negotiated, issued, delivered and countersigned in the state of Missouri and thereby becoming a Missouri contract of insurance; that by terms of said policy so issued by Central Mutual to the said Cooper-Jarrett, Inc., said Central Mutual agreed to indemnify said Cooper-Jarrett, Inc., against all liability imposed upon it by law for personal injuries or death of any person caused by or through the ownership, maintenance or operation of any automobiles, trucks, motor vehicles or trailers owned, hired, leased or used in said busi-
[fol. 22] ness of Cooper-Jarrett, Inc., as a contract hauler; and that upon the injury or death of any person by reason thereof the liability of said Central Mutual Insurance Company of Chicago should become absolute without the necessity of satisfying any judgment which might have been obtained against said Cooper-Jarrett, Inc., and that upon the failure of said Central Mutual Insurance Company of Chicago, Illinois, to pay any such final judgment, such judgment creditor could maintain an action in any court of competent jurisdiction to compel the payment thereof, and that nothing contained in said policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured, should relieve said Central Mutual Insurance Company of Chicago, Illinois, from liability thereunder, or from the payment of any such judgment; that the said Cooper-Jarrett, Inc., was a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, having its main and home office in Kansas City, Jackson County, Missouri; that it was further provided in said policy of reinsurance, excess insurance, coinsurance, concurrent insurance or joint insurance issued by plaintiff, that plaintiff should have the right and opportunity to associate itself with said Central Mutual Insurance Company of Chicago, Illinois, in the defense and control of any claim or suit covered by the said liability policy

of said Central and the right to cancel any individual policy; that said contract, treaty or policy should be subject to the statutory requirements of the respective states in which said Central Mutual's policies were issued or effective, and subject in all respects to all the general and special stipulations and clauses, waivers and modifications of the original policy, or primary policy, or other undertaking, and any endorsements or riders thereon; that under and by virtue of said contracts or policies of insurance and the endorsements required by the states of Ohio and Missouri, plaintiff and said Central Mutual Insurance Company of Chicago, Illinois, became absolutely bound and liable to defendant for damages on account of the death of said Dewey Brillhart notwithstanding any condition, provisions, stipulation or limitation contained in said contracts or policies of insurance to the contrary or the violation of the same by the assured; that the original contract, treaty, or policy of reinsurance, excess insurance, concurrent insurance, coinsurance or joint insurance, is in the hands and subject to the control of plaintiff and said Central Mutual [fol. 23] Insurance Company of Chicago, Illinois, and the original liability policy issued by said Central Mutual Insurance Company of Chicago, Illinois, to said Cooper-Jarrett, Inc., is in the hands and subject to the control of said Cooper-Jarrett, Inc., and for such reasons defendant is unable to file the same with this pleading.

4. Defendant further alleges that he is and was at all the times herein mentioned a citizen and resident of the state of Kansas; that his decedent at all of said times was a citizen and resident of the state of Missouri; that the proceedings herein are upon and relate to Missouri judgments against said Cooper-Jarrett, Inc., and Central Mutual Insurance Company of Chicago, Illinois, and that under the terms and provisions of said policy of liability insurance issued by said Central Mutual and of said reinsurance, excess insurance, concurrent insurance, coinsurance and joint insurance, so executed by the plaintiff and under the laws of Missouri, and under the laws of the state of Ohio where the accident occurred upon which plaintiff's suit and judgment are based, both said Central Mutual and said plaintiff are liable not only to the defendant but also to said Cooper-Jarrett, Inc., and that under the terms of said primary insurance policy and said contract, treaty

or policy of reinsurance, excess insurance, concurrent insurance, coinsurance and joint insurance, it was the duty and obligation of both plaintiff and said Central Mutual to perform their respective contracts or policies of insurance in the state of Missouri by defending defendant's action therein and by paying and satisfying in said state defendant's judgment and that under the terms of said policies and under the laws and decisions of Missouri and Ohio, defendant became and is the beneficiary under said policies of insurance; that said contract, policy or treaty of reinsurance, excess insurance, concurrent insurance, coinsurance and joint insurance, matured in the state of Missouri, and became an outstanding liability of plaintiff and said Central Mutual in said state upon the filing of defendant's suit therein; upon the rendition of defendant's judgment against said Cooper-Jarrett, Inc., upon the institution of garnishment proceedings, upon said judgment against said Central Mutual in said state, and upon the institution of garnishment proceedings against plaintiff based upon defendant's judgments herein, and that by reason of all of said matters the liability of plaintiff under such contract, treaty, or policy of insurance, accrued in the [fol. 24] state of Missouri and plaintiff's obligation and liability under its said contract, treaty or policy arose out of and is based upon action or acts arising out of business transacted, acts done and contracts made in the state of Missouri or governed by the laws of the state of Missouri.

5. Defendant further alleges that it is provided by Sec. 500, Chapter 73, Smith-Hurd, Revised Statutes of Illinois, 1935, being a statute of the state of Illinois duly enacted by the Legislature thereof and in full force and effect at all times involved in this proceeding; that a receiver may be appointed to take charge and possession of the Illinois assets of a foreign insurance company transacting business in said state and manage, control and liquidate the same for the benefit of Illinois creditors of such foreign insurance company in the same manner and to the same extent as the receiver of an Illinois Insurance Company operating under and pursuant to Sections 496, 497 and 498 of Chapter 73, Smith-Hurd, Revised Statutes of Illinois, 1935, and that such Illinois receiver of the assets of such foreign insurance company transacting business in said state should have power to administer, control and liquidate reachable assets

in said state on behalf of Illinois creditors thereof even though there be at said time a domiciliary receiver of such foreign insurance company in charge thereof in the domicile of said foreign insurance company; that by Sec. 501 (Sec. 7) Chapter 73, Smith-Hurd, Revised Statutes of Illinois, 1935, it is provided that:

"The rights and duties of the said receiver when so appointed with reference to such non-resident or foreign company and its assets shall be those usually exercised by and imposed upon ancillary receivers of non-residents or foreign corporations in this State."

That by Sec. 502a and 503b, of Chapter 73, Smith-Hurd, Revised Statutes of Illinois, duly enacted by the Legislature thereof and in full force and effect at all times herein referred to, it is provided as follows:

"502a. Application for accounting, injunction, etc., Sec. 8a. No order, judgment or decree providing for an accounting or enjoining, restraining or *interferring* with the prosecution of the business of any domestic insurance corpora-[fol. 25] tion subject to the supervision of the Director of Trade and Commerce, or appointing a temporary or permanent receiver thereof, shall be made, or granted otherwise than upon the application of the Director of Trade and Commerce, represented by the Attorney General, except in an action by a judgment creditor or in proceedings supplementary to execution after notice thereof has been served upon the Director of Trade and Commerce of final judgment at least 30 days prior to the filing of such bill.

"503b. Practice, Sec. 11. The mode of summoning parties into court, rules of practice, course of procedure, and powers of the court in all cases arising under this Act, shall be the same as in ordinary proceedings in equity in this State and as by law provided."

That the Supreme Court of Illinois, being the court of last resort in said State, in the case of People v. Heihaus, 336 Ill. 104, 190 N. E. 349, held that the aforesaid insurance statutes of the State of Illinois respecting the appointment of a receiver for an insurance company, makes such receiver an executive or administrative officer and not a judicial officer.

That the Illinois Court of Appeals in the case of Miller v. Central Mutual Insurance Company of Chicago, 299 Ill.

App. 194, 19 N. E. (2d) 822, held that the Illinois statutes relating to receivership of insurance companies only conferred general equity powers upon the court in such receivership cases and that such receiver was and became an administrative rather than a judicial officer.

6. Defendant further alleges that in the receivership proceedings of Central Mutual Insurance Company of Chicago, Illinois, referred to in plaintiff's bill, the Illinois Court having jurisdiction thereof and supervisory control thereover, recognized the power and jurisdiction of courts in other jurisdictions to proceed to final judgment in cases pending therein against Central Mutual Insurance Company of Chicago, Illinois, and made an order in said cause authorizing receiver to defend only the cases pending against said insurance company in other courts where said insurance company had put up collateral security and that said court in said order further authorized said receiver to abandon the defense of several hundred other cases pending in various [fol. 26] courts, allowing the same to proceed to judgment without any defense thereof by such receiver, Miller v. Central Mutual Insurance Co. of Chicago, 299 Ill. App. 194, 19 N. E. (2d) 822.

Defendant further alleges that it was held by the Supreme Court of Illinois, being the court of last resort in said State, in the case of Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091, that the receiver's power extends no further than that of the court appointing him and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court, and that in contempt proceedings against a creditor who seeks by attachment or garnishment to reach debts due to an insolvent debtor for non-residents, it is proper for the court to inquire which of the parties has a permanent right or superior equity in the debts; that it was held by the Supreme Court of Illinois in Mulcahey v. Strauss, 151 Ill. 70, 30 N. E. 402, that where a suit is brought against an insolvent in receivership without leave of court in the receivership proceedings that the remedy is by injunction or contempt proceedings, but that the judgment rendered in said cause is not void; that is, that it was held by the Supreme Court of Illinois in the case of Holbrook v. Ford, supra, and by the Illinois Court of Appeals in the case of Corn Exchange Bank v. Rockwell, 58 Ill. App. 506, that a contro-

versy between a foreign receiver and an Illinois attaching creditor of the insolvent that the court would protect the Illinois creditor whether the attachment was prior or subsequent to the appointment of the foreign receiver; that it was held by the Illinois Court of Appeals in the cases of Boyles v. Royal Canner Mfg. Co., 216 Ill. App. 576; Ill. etc. Bank v. Northern Bank, 214 Ill. App. 440, and Smith v. Berz, 125 Ill. App. 122, that Illinois creditors attaching property in Illinois acquire rights thereto superior to those of a foreign receiver of such debtor who has not reduced the property to possession before attachment, and by the last mentioned case it was further held that an order of the foreign court enjoining prosecution of attachment proceedings has no extra territorial effect as to persons not parties to the foreign proceedings.

7. Defendant further alleges that the Central Mutual Insurance Company of Chicago, Illinois, was at all times herein mentioned an insurance corporation organized under the laws of a state other than Missouri and duly authorized and licensed to transact an insurance business in the State [fol. 27] of Missouri, having appointed the Superintendent of Insurance of said state as its agent, upon whom service of process might be made in said state in all actions against said insurance company; that prior to proceeding to a trial and judgment herein against said Cooper-Jarrett, Inc., defendant obtained leave of and from the bankruptcy court wherein reorganization proceedings in bankruptcy of said Cooper-Jarrett, Inc., where pending, being the United States District Court for the Western Division of the Western District of Missouri, said bankruptcy court making an order granting this defendant leave to prosecute his cause in the Circuit Court of Jackson County at Independence to judgment; that the plaintiff was given full and timely notice of the proceedings herein prior to the rendition of said judgment against said Cooper-Jarrett, Inc., and was afforded a full and ample opportunity to investigate, appear and defend the same on behalf of said Cooper-Jarrett, Inc., and on behalf of said Central Mutual Insurance Company of Chicago, Illinois, and on its own behalf, but that plaintiff failed, refused and omitted to take advantage of said opportunity and to investigate, appear and defend said action; that the premises considered and in view of the fact that Cooper-Jarrett, Inc., and said Central Mutual Insurance Company

of Chicago, Illinois, were duly served in said cause the judgment herein against said Cooper-Jarrett, Inc., and and against said Central Mutual Insurance Company, Chicago, Illinois, are final, valid and subsisting judgments, by which both they and the plaintiff herein are bound, and that the same are and have become res adjudicata and final, so far as this proceeding is concerned.

8. Defendant further alleges that the claimed defenses based upon the Illinois receivership of Central Mutual Insurance Company of Chicago, Illinois, and the injunction therein, constitute affirmative defenses (if the same constitutes any defense, which defendant denies) which the said Central Mutual Insurance Company of Chicago, Illinois, and which the plaintiff herein having notice of said proceedings failed and omitted to plead or set up in opposition to the garnishment proceedings instituted by the defendant against said Central Mutual Insurance Company of Illinois, based upon the judgment herein against Cooper-Jarrett, Inc., and that said insurance companies, having failed to avail themselves of the supposed constitutional provisions claimed by plaintiff to have been violated, forever waived, [fol. 28] abandoned and lost such supposed defenses.

9. Defendant further alleges that all the issues of and concerning plaintiff's liability to defendant on account of said judgment, referred to in plaintiff's bill of complaint, and on account of said contracts or policies of insurance referred to, can be decided in the garnishment proceedings referred to in said bill, said judgment having been rendered by the Circuit Court of Jackson County, Missouri, at Independence, in a cause of action therein entitled Dewey Brillhart, Administrator of the estate of James Dwight Brillhart, deceased, v. Cooper-Jarrett, Inc., No. 83,918; that an execution has been issued upon said judgment and plaintiff herein summoned to answer as garnishee, and that said garnishment proceedings are now pending and undisposed of in the Circuit Court of Jackson County, Missouri, at Independence, and were pending long prior to the institution of the proceedings herein.

Defendant further alleges that there are now pending in the Circuit Court of Jackson County, Missouri, garnishment proceedings upon four judgments rendered against said Cooper-Jarrett, Inc., and said Central Mutual, includ-

ing that of defendant herein, under identical circumstances, the style of the cases, dates of filing and the date and amount of the judgments being as follows, to-wit:

Stye of Case.	Amount of Recovery Sought.	Date of Filing.	Date and Amount of Judgment.	
William T. Alford, Administrator (later Carlton R. Benton, Administrator) of the Estate of Ralph Russell Phillips, deceased, v. Cooper-Jarrett, Inc.	$50,000	12-14-35	11-10-38	$15,000
Rex Phillips v. Cooper-Jarrett, Inc.	10,000	7-8-36	11-10-38	10,000
Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, v. Cooper-Jarrett, Inc.	25,000	12-4-35	4-22-39	20,000
Walter C. Young v. Cooper-Jarrett, Inc.	10,000	4-23-36	4-22-39	10,000

Defendant further alleges that on January 13, 1940, plaintiff herein filed a bill of complaint for declaratory judgment and other relief in the District Court of the United States for the Western Division of the Western District of Mis-[fol. 29] souri, styled The Excess Insurance Company of America, a corporation, Plaintiff, v. Cooper-Jarrett, Inc., a corporation, Carlton R. Benton, Administrator d. b. n. of the Estate of Ralph Russell Phillips, deceased, Rex Phillips, Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, and Walter C. Young, Defendants, No. 447, said bill being identical in its allegations with that filed herein, and, that thereafter and on March 22, 1940, after having obtained service upon defendants, Cooper-Jarrett, Inc., Carlton R. Benton and Rex Phillips, plaintiff voluntarily dismissed said suit for a declaratory judgment and filed its reply to plaintiffs' denial of garnishee's answer in the Benton and Phillips garnishment in the state court, setting up in defense thereof the identical grounds set forth in plaintiff's bill herein for a declaratory judgment and other relief.

10. Defendant further alleges that all the parties interested have not been made parties to this suit either as plaintiff or defendants and will not be bound by a judgment rendered herein; that any decision rendered by this court will not finally establish the liability or non-liability of this

plaintiff; that the filing of the bill herein will not clarify or settle the legal relations in issue; that it will not terminate and afford relief from the alleged uncertainty, insecurity and controversy giving rise to the proceeding, and that a proceeding involving the identical issues between the parties hereto is already pending in another tribunal and that the remedy therein will be more effective or appropriate under the circumstances; that if the plaintiff has a good defense the same may be asserted in the said pending garnishment proceeding.

Wherefore, defendant prays that the court refuse to take and assume jurisdiction of this suit, or the subject matter thereof, or the alleged controversies herein presented; that it will hear and determine defendant's motion to dismiss before proceeding to hear the cause upon the merits and dismiss the same; and, in the event of the failure of the court to dismiss said cause upon the pleadings that by reason of the matters and facts stated in defendant's answer, the court by its order and decree discharge defendant and permit him to go hence without day and recover his costs herein and [fol. 30] dismiss this action, and for such other and further relief as to the court may seem just and equitable in the premises.

Ratner, McAllister & Mattox, by (Signed) Stuart T. McAllister, Parsons, Kansas; Clarence C. Chilcott (Signed), 918 Scarritt Bldg., Kansas City, Mo., Attorneys for Defendant, Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased.

Received copy hereof this 22 day of June, 1940.

Ryland, Stinson, Mag & Thomson, by Paul R. Stinson, 201 First National Bank Bldg., Kansas City, Mo.; Louis R. Gates, D. H. Woods, 406 Commercial National Bank Bldg., Kansas City, Kansas, Attorneys for Plaintiff, Excess Insurance Company of America.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS OF JULY 1, 1940

Hearing had before the Honorable Richard J. Hopkins, judge of the above entitled court, without a jury, at Kansas City, Kansas, Monday, July 1, 1940.

The plaintiff in this action was represented by Messrs. Ryland, Stinson, Mag & Thomson, of Kansas City, Missouri, by Mr. Paul R. Stinson and Mr. R. H. Woods, and by Mr. Louis R. Gates of Kansas City, Kansas.

The defendant was represented by Mr. Stuart McAllister of Parsons, Kansas, and Mr. C. C. Chilcott of Kansas City, Missouri.

The Court: There is a motion to dismiss here and I wish you would tell me first of all about the starting of the litigation in Missouri.

[fol. 31] Mr. McAllister: Mr. Chilcott filed the suit.

The Court: All right.

Mr. Chilcott: Your Honor, Mr. Brillhart lived in Kansas and his son was the person who was killed in this accident. He employed Mr. Ratner and Mr. Ratner got us to help him and we filed suit in the Independence Division. That suit was filed sometime in 1935. Of course, they are given a number and of course they come up in rotation as listed. That suit pended along for a long time and finally Cooper-Jarrett went into the hands of a Receiver.

The Court: That was an action against the insurance company?

Mr. Chilcott: No, that was an action against Cooper-Jarrett, the defendant, the one who caused the death. That was an action against them. Now, thereafter Cooper-Jarrett attempted reorganization under Section 77B, the Federal act. In the course of that bankruptcy proceeding, Judge Reeves issued an order permitting us and three other plaintiffs who had suits pending in the courts of Jackson County, growing out of a similar transaction in the State of Ohio to proceed against Cooper-Jarrett. I can't tell you, your Honor, which one went into bankruptcy first, or insolvency first, whether Cooper-Jarrett or the Central Mutual, but the Central Mutual on January 30, 1934, issued its public liability policy and placed thereon endorsements pursuant to the orders of the Public Service Commission of Missouri and a similar body acting for the State of Ohio. In 1932, and previous to the issuance of this policy, this public liability policy, the Central Mutual Insurance Company of Chicago had taken out a policy of insurance, excess insurance, with the Excess Insurance Company of New York which provides that all policies issued by Central Mutual subsequently to that policy, that they would have the insurance over and above five and ten thousand dollars. Now, along while this suit

was pending against Cooper-Jarrett, and while all four of these suits, as a matter of fact, were pending against them——

The Court: (Interrupting) Was Cooper-Jarrett incorporated?

Mr. Chilcott: Yes, sir, Mr. Cooper operated a truck line from Kansas City, Missouri, through New York through specified routes.

[fol. 32] The Court: Yes.

Mr. Chilcott: While that suit was pending, Mr. Frank Barker had been appointed by Judge Reeves, either appointed by Judge Reeves or it was agreed that he act as attorney for Cooper-Jarrett and they were attempting to get the assets of Cooper-Jarrett together. He wrote a letter to the Excess Insurance Company of New York, advising them of these suits which were pending, the policy of the Excess having provided they could participate in any defense of any of the claims which arose under the primary policy issued by Central Mutual, and Excess Insurance Company refused to defend these lawsuits. That was, I think, in January or February, 1939. Afterwards on, I think, it was April 20, 1939, we took a default judgment against Cooper-Jarrett. We put on our evidence. We have a procedure in Missouri that provides you take an interlocutory judgment and you proceed on to final judgment. That was in the state court at Independence. The same thing was done in the Young case which comes out of the same accident, and in the Phillips actions which grew out of this accident. Pursuant to that, garnishment proceedings were instituted and the Central Mutual Insurance Company of Chicago summoned as garnishee. That was to the September, 1939, term of court at Independence, and in due time interrogatories were filed. No answers were made to those interrogatories and thereafter along in January, 1940, sometime, a default judgment was taken against the Central Mutual Insurance Company of Chicago. A judgment was not taken against that company at that time in favor of Brillhart because the sheriff or I mean the Clerk of the Court at Independence had lost the execution. We couldn't find the execution of garnishment on the sheriff of Cole County. These summonses being necessary to summon the garnishee by service on the Superintendent of Insurance, and they were not discovered until just recently, and just recently we have taken a default judgment against Central Mutual

Insurance Company of Chicago for the amount of our judgment, our judgment against Cooper-Jarrett. Now the proceedings are pending now in the Phillips cases. The garnishment proceedings are pending upon the answer of the garnishee, which is the Excess Insurance Company of New York, plaintiff in this case. In the Young case, Mr. Young has died and the judgment over there has recently been revived in the name of the Public Administrator of Jackson [fol. 33] County. In the Brillhart suit garnishment has been issued and served upon the Superintendent of Insurance as against Excess Insurance Company of New Jersey. I think they have subsequently changed to New York. That is the way the situation was. I don't recall just when this suit was filed, April 4th, 1940.

Mr. McAllister: Answer of the garnishee is due in September on this garnishment.

Mr. Chilcott: Yes, in this particular case as well as in the Young cases.

Mr. Woods: If I might bring out one point in that connection. He was mistaken. This was April 10th when this declaratory judgment suit was filed at Fort Scott. At that time no judgment had been attained in the Brillhart case and no judgment and garnishment had been issued against the Excess of America. It was — until after this case was filed, and until May 29th this year that summons and garnishment was issued against the Excess in this case. It was just last week that judgment was taken against Central Mutual of Chicago by default in the Independence Division.

Mr. Chilcott: I think it was in January, 1940, that the plaintiff in this case, the Excess Insurance Company, brought a declaratory judgment suit in the District Court of the United States for the Western Division of the Western District of Missouri against all four of these judgment creditors.

The Court: Who brought that suit?

Mr. Chilcott: The same plaintiff that brought this suit. I was not present at their argument before Judge Reeves when he refused to issue the temporary injunction. I don't know whether they had any argument or not. You didn't have any argument on the merits, did you, in that suit before Judge Reeves?

Mr. Stinson: We had an argument on the temporary injunction.

Mr. Chilcott: And Judge Reeves refused to issue the temporary injunction, and afterwards this plaintiff here dismissed that declaratory judgment suit over in the District Court for the Western District of Missouri.

[fol. 34] Mr. Stinson: Your client was made a defendant in that suit, was invited to come in and declined to do it.

Mr. Chilcott: Yes, we were made defendant as well as Young made a defendant.

The Court: I am wondering why Kansas, the District Court of Kansas should be considering this matter. What good reason is there why the Federal Court of Kansas should take over this litigation from the State of Missouri?

Mr. Woods: I would like to go through the facts as they occurred here and try to show your Honor why the District Court of Kansas should retain jurisdiction of this case.

The Court: All right.

Mr. Woods: This is a suit for a declaratory judgment brought by the Excess Insurance Company of America, the plaintiff here, to have judicially interpreted——

The Court: (Interrupting) Why didn't you go ahead with your suit in Missouri? Did you dismiss that?

Mr. Woods: We couldn't get service upon these defendants in Missouri because they are residents of Kansas, and of course, it was impossible for us to get service on them over here.

The Court: Go ahead.

Mr. Woods: The purpose of this suit is to have interpreted this contract of reinsurance which was entered into between the Central Mutual Insurance Company of Chicago, Illinois, and the plaintiff, the Excess Insurance Company in New York. In addition to that, we ask the independent, equitable jurisdiction of this court to enjoin this plaintiff from enforcing against the Excess Insurance Company of America these judgments which he has obtained in the state courts of Missouri upon the ground that those judgments were obtained under circumstances which would render their enforcement inequitable and unconscionable.

The Court: Well, now, you were invited to join in that litigation and you declined to do so.

Mr. Woods: Your Honor, if I may point out to you, we were not invited to join in that litigation. If I may bring in these other matters first, I think it will make it clearer.

[fol. 35] The Court: All right.

Mr. Woods: I will bring that out later on. This contract of reinsurance was entered into between the Excess and Central in 1932. That contract was drawn and provided that Excess would reinsure the Central Company for public liability policies issued by Central in favor of various companies engaged in using automobiles or trucks, and under which the reinsurer, which is Excess, agreed to repay any amounts of ultimate net loss which the company, referring to Central, may pay in excess of, first, five thousand dollars on account of any one person injured or killed, and in excess of, first, ten thousand dollars on account of more than one person injured in the same accident, and that policy went on to define the term "ultimate net loss" which means the sum actually paid in cash, paid in settlement of loss for which the company is liable, referring to Central. Also it provided that Central should file a specimen copy with them when it issued one; that it should notify them of any action under the policy which this reinsurance covered; that it should notify them of any claim and of any suit being filed. None of that was done by Central.

Now, in 1934, as Mr. Chilcott said, Central issued this policy, this public liability insurance policy to Cooper-Jarrett, which covered, first, for five thousand dollars for one person and subsequently in March of that year was raised to ten thousand dollars for any one person in case of accident. In October of this year this accident occurred in which the defendant Brillhart's decedent was killed near Ashtabula, Ohio, and in which the defendant Young, who has not been served because he is a defendant who is dead, claims to have been injured. After that and in December of 1935, Mr. Brillhart, the defendant in this case, filed suit against Cooper-Jarrett, in the Jackson County court at Independence, and then in April of 1936, Mr. Young filed suit against them. Now, the defense was tendered Central by Cooper-Jarrett, and they refused to defend upon the ground that the policy did not cover Workmen's Compensation, and on the further ground that the premiums had not been paid by Cooper-Jarrett. Well, upon that Shughart and Johnson, who then represented Cooper-Jarrett, entered their appearance, filed pleadings in the case. Then in January of 1937, the Circuit Court of Cook County, Illinois, ordered the liquidation of the Central Mutual Insur-
[fol. 36] ance Company upon the information filed by the Superintendent of Insurance in the State of Illinois and

Henry G. Miller was then appointed receiver. That court on January 21st, issued its order restraining and enjoining all parties from prosecuting any suits against Central Mutual Insurance Company except in the receivership court and on February 1st of 1937, it ordered the receiver not to assume or undertake the defense of any suit then pending or thereafter instituted against Central except in the Receivership court. That notice was sent out by the Receiver and on February 19th, the first notice was published, which directed creditors to file their claims in the receivership court in Chicago, Illinois. That was published in the Chicago papers and the order provided it be so published and copies sent out to all policy holders and to all claimants. Then on May 14th of 1937, Cooper-Jarrett instituted its petition for reorganization under 77B in the District Court of the United States for the Western Division of the Western District of Missouri. That was before Judge Reeves and that petition approved that very same day. Mr. Frank Barker at that time represented the corporation, Cooper-Jarrett, which was to be reorganized, and following that on September 30th of 1937, that is the same year, Shughart and Johnson withdrew as counsel for Cooper-Jarrett in these damage suits, the Brillhart and Young cases. The file was turned over to Mr. Barker at that time, but after September 30th no defense at all was made for any of these cases pending in the state courts. Then sometime, I think in December of 1938 if I am not mistaken, Mr. Brillhart and Mr. Young, the defendants in this case, filed their claims in the 77B proceedings. Then on April 1st on ex parte application, they obtained——

Mr. Gates: (Interrupting) April 1, 1939.

Mr. Woods: (Continuing) Thank you. They obtained the leave of that court to prosecute these actions in the state court upon the information that there was liability insurance carried by Cooper-Jarrett. On that same day, April 1st, 1939, they withdrew the claims they had filed before in the 77B proceeding and on that same day, April 1, 1939, Cooper-Jarrett was finally discharged by the 77B court from any liability to these two defendants or to any other of these tort claimants. That was the final order winding up the 77B proceeding and approving the plan [fol. 37] presented, and it discharged Cooper-Jarrett from any liability to any of these tort claimants.

The Court: Upon what sort of hearing was that, after they had withdrawn their claims?

Mr. Woods: It was upon the final hearing.

The Court: They were not represented.

Mr. Stinson: It all happened the same day.

The Court: But they were not represented at that proceeding?

Mr. Chilcott: I was not there, and I don't think anybody representing any of the judgment creditors were there.

Mr. Stinson: Was ever any protest made to that final discharge?

Mr. Chilcott: Not that I know of.

Mr. Woods: Then, your Honor, 13 days after that, on April 13, 1939, Mr. Brillhart and Mr. Young obtained the default judgment. It was an interlocutory order in the Circuit Court of Jackson County at Independence against Cooper-Jarrett. Mr. Brillhart's judgment in that instance was for $20,000.00, and Mr. Young's for $10,000.00. Those judgments were made final on April 22, 1939, and I might add to your Honor that the transcript of the proceeding shows that there was no evidence offered as to the earning power of this boy, the Brillhart decedent, or any detailed information as to his employment by Cooper-Jarrett or anything. The only information given the court for the amount of the judgment was in his ex parte statement, "I think I ought to have a judgment for $20,000.00." The transcript shows that.

Mr. Chilcott: There was a witness introduced. Mr. Young testified.

Mr. Woods: Yes, Mr. Young testified, but it was brief and related solely to a few of the incidents surrounding the accident. Now, on June 20th, these two defendants issued summons and garnishment against the Central Mutual Insurance Company of Chicago, Illinois, by having them served upon the Chief Clerk of the Superintendent of Insurance.

[fol. 38] Mr. Gates: June 20, 1939.

Mr. Woods: (Continuing) Of the State of Missouri. That, your Honor, was two years, almost two and a half years after the institution of the receivership proceedings for Central in Chicago, after the claims had been barred, after the Circuit Court of Cook County had entered its restraining order forbidding any suits to be brought against Central Mutual except in the receiver's court. Now, service was had upon Henry G. Miller, the Receiver thereof on September 15th of 1939. The interrogatories under those sum-

monses and garnishment were filed in the Independence Division of the Circuit Court for Jackson County. Then on February 9th, Mr. Young, the defendant, obtained judgment against Central by default for $10,450.00. Central was not represented at that time at all, and in addition it is my understanding that Mr. Young was dead at that time; that he had died in August of 1939. On January 18th of 1940, the defendants in these cases issued additional summons and garnishment against Central Mutual. These were in addition to the ones they had first had issued June 20th, 1939. They sent out these others last January, and interrogatories under that second set of summons and garnishment were filed March 11th. Then on April 4th of this year the plaintiff in this suit filed this action for declaratory judgment. It was served upon the defendant Brillhart on April 19, 1940, and service could not be had upon the defendant Young because he had died last summer and there was no representative here in Kansas. In fact, after this suit was filed or perhaps it might have been shortly before, an administrator was appointed for Young who died a resident of Kansas, here in Missouri. That is, they appointed the public administrator of Jackson County, Missouri, as his representative. Then on May 29th of this year, summons and garnishment were issued by this defendant Brillhart and in the Young case also, against the plaintiff in this case. Of course, it ran because of the judgments against Cooper-Jarrett and Central in the Brillhart case; since they had obtained no judgment against Central it ran directly from Cooper-Jarrett to Excess. On June 21st, an interlocutory judgment was obtained by Brillhart against Central for $22,100.00, and that judgment was made final the 28th of June, 1940. The transcript of the proceedings in that suit shows the policy of insurance was not introduced in evi- [fol. 39] dence. The only reference made was to the judgment obtained against Cooper-Jarrett, and no other information was given to the court upon which to base that judgment.

Mr. Stinson: And it was for $22,000.00.

Mr. Woods: It was for $22,100.00, eleven hundred dollars in excess.

Mr. Stinson: No, twelve thousand dollars.

Mr. Woods: I beg your pardon, twelve thousand dollars of what the original liability of the Central Mutual Company was. There was a ten thousand dollar limit of liability

there. Now, your Honor, under these circumstances, we maintain that the plaintiff in this case has a right to have its liability first under its contract of reinsurance with Central Mutual Insurance Company judicially interpreted by this court.

The Court: Why by this court?

Mr. Woods: There was an actual controversy pending between the two defendants in this case. They were threatening to go ahead and pursue us through garnishment proceedings in order to recover upon the basis of the default judgment obtained against Cooper-Jarrett. They had not instituted suit at the time we did file this declaratory judgment action; they were threatening to do so and in fact admitted so in their answer to the petition. Now, the authorities are clear that under such circumstances, the Federal Declaratory Judgment act gives us a remedy, and particularly when in the position of the plaintiff in this case. In other words, he does not have to await the time when coercive action may be brought against him, but he may institute his action before that date in order to have his liability determined. That is exactly what the plaintiff has done in this case. They were bein, threatened with prosecution; these suits had not been actually instituted against them, but there was the active threat. Under those circumstances they chose to file this action for declaratory judgment rather than to await such time as when coercive action might be brought against them by these defendants.

The Court: Well, let's see. The Central Insurance Company, I understand, had insured this Cooper-Jarrett, and the Excess Insurance Company had reinsured the Central? [fol. 40] Mr. Woods: That is correct, your Honor.

The Court: Now, this whole controversy grows out of an injury or death occurring when?

Mr. Woods: In 1934, October of 1934.

The Court: October, 1934.

Mr. Stinson: In Ohio.

The Court: And Cooper-Jarrett was insured by both the Central and the Excess. Now, why was the suit filed in Missouri against Cooper-Jarrett?

Mr. Chilcott: They are a Missouri corporation, your Honor. They have their main office in Kansas City, Missouri.

The Court: I see. Well, anyway, almost six years ago—what was it, a death?

Mr. Chilcott: A death, your Honor.

Mr. Woods: Defendant Brillhart's decedent was killed, your Honor.

The Court: Yes, and during almost six years now the representatives of the decedent, by one technicality or another have been prevented from recovering for that death. It will be six years next October. Now, having had all these various lawsuits and you having filed one yourself in the Federal District Court of Missouri, you abandon that suit and come over into Kansas and file one. I don't think this court ought to interfere with it.

Mr. Woods: Your Honor, if I might go a little further. It is true that this suit was filed in December of 1935, but this plaintiff, the Excess Insurance Company of America, had no notice of the occurrence of these accidents or the filing of this suit at any time until this letter written by Mr. Barker.

The Court: When was that?

Mr. Woods: In February of 1939, and in that they did not——

The Court: They never heard of these deaths?

Mr. Gates: That is right.

Mr. Woods: Until February, 1939, and in that letter Mr. Barker merely said that or listed these four cases, the [fol. 41] Brillhart and the Young, the Phillips and the Benton cases and said some have gone to judgment.

Mr. Chilcott: This one had not gone to judgment then.

Mr. Woods: The information was not given at all.

The Court: What inquiry did they make when they got that letter.

Mr. Woods: Mr. Barker asked them, he said he heard they had reinsurance of Central Mutual policies. He asked them what their policy was and asked them what they wanted to do. He said, "If your company desires to take over or assist in any or all of the above matters, please let me hear from you at your early convenience." Now, they replied to that letter on February 20th, telling him that the proper party for him to communicate with was the Central Mutual Insurance Company of Chicago, Illinois, and its receiver, and after that they had no further communication about any of these actions that were pending. Before that they did not know of the issuance of this policy to Cooper-

Jarrett. They did not know of the occurrence of the accident or the prosecution of these claims at all. The first they knew was in February, 1939, at a time when Central had already been discharged from liability, or its Receiver, and just a little more than a month *before Cooper Jarrett* was discharged from liability in the 77B proceeding.

The Court: As I understand, the merits of the case with reference to the death of this decedent have never been tried?

Mr. Woods: That is correct, and it is almost six years now.

The Court: Well, I don't think this court will interfere with that. This case will be dismissed.

You may draw a journal showing that after this long lapse of time, after your litigation in Missouri, that this court feels in its discretion that it ought not to interfere with that litigation in any way.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Filed July 29, 1940

Now on this first day of July, 1940, pursuant to assignment, this cause coming on to be heard upon the plaintiff's bill of complaint for declaratory judgment and other relief, and upon defendant's motion to dismiss the same, the plaintiff appearing by its attorneys of record, Paul R. Stinson, Louis R. Gates and Dick H. Woods, and the defendant appearing in person and by his attorneys of record, Stuart T. McAlister and Clarence Chilcott, and the Court having duly considered said bill of complaint and said motion to dismiss, having heard and considered the statements of fact and arguments of counsel, and the length of time which has transpired since the inception of the Missouri suit referred to in plaintiff's complaint, and being fully advised in the premises, finds that in the exercise of the Court's sound discretion defendant's motion to dismiss plaintiff's bill should be sustained, and the case be not heard upon the merits by this Court.

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff's bill of complaint be and it is hereby dismissed at the costs of plaintiff, to which ruling, order and judgment, the plaintiff excepts.

It Is Further Ordered, Adjudged and Decreed, pursuant to Rule 41 (b) of the existing Federal Rules of Procedure, that this order of dismissal is not an adjudication upon the merits of the bill of complaint or of the plaintiff's cause of action.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed August 28, 1940

Notice is hereby given that The Excess Insurance Company of America, plaintiff in the above-entitled action, hereby appeals to the Circuit Court of Appeals for the [fol. 43] Tenth Circuit from the decree and final judgment of dismissal entered in this action on July 1, 1940.

Louis R. Gates, 406 Commercial National Bank Building, Kansas City, Kansas; Paul R. Stinson, 201 First National Bank Building, Kansas City, Missouri; Dick H. Woods, 201 First National Bank Building, Kansas City, Missouri, Attorneys for Appellant, The Excess Insurance Company of America.

Ryland, Stinson, Mag & Thomson, Kansas City, Missouri, of Counsel.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTES RE APPEAL BOND, DESIGNATION OF RECORD AND STATEMENT OF POINTS

[Appeal bond in the sum of $250, with appellant as principal and United States Guaranty Company as surety, was filed August 28, 1940.]

[The designation of record filed in the trial court is identical with the designation printed at page 2.]

[The statement of points relied on, filed in the trial court, is identical with the statement printed at page 1.]

IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME TO FILE AND DOCKET APPEAL—Filed October 5, 1940

Now, on this 5 day of October, 1940, for good cause shown, it is ordered that time for filing and docketing appeal in the above-entitled case be and is hereby enlarged fifteen days, and said appeal shall be filed on or before October 22, 1940.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION

Third Day, April Term, Wednesday, April 16th, A. D. 1941. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, Dick H. Woods, Esquire, appearing for appellant, Clarence C. Chilcott, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—June 23, 1941

Dick H. Woods (Louis R. Gates, Paul R. Stinson, and Ryland, Stinson, Mag & Thompson were with them on the brief) for Appellant.

Clarence C. Chilcott (Stuart T. McAlister, Ratner, McAlister & Mattox were with him on the brief) for Appellee.

Before Phillips, Bratton and Huxman, Circuit Judges

Huxman, Circuit Judge, delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the District of Kansas dismissing ap- [fol. 45] pellant's petition for a declaratory judgment. (28 U. S. C. A. § 400.) The sole question presented for consideration is the right of the Excess Insurance Company of America, appellant herein, to maintain an action for a declaratory judgment seeking to determine its liability to appellees under a reinsurance agreement contract executed by it with The Central Mutual Insurance Company of Chicago, Illinois, herein referred to as Central.

Appellant and Central were both engaged in writing indemnity insurance. In 1932 appellant entered into a reinsurance contract with Central whereby it agreed to reinsure the risks assumed by Central under contracts it would write, subject to the conditions and provisions in the contract. In 1934 Central issued a public liability insurance policy to Cooper-Jarrett, Inc., insuring it against loss for liability imposed on it by law resulting from the operation of its trucks in its transport business. In October, 1934, a Cooper-Jarrett truck was involved in an accident resulting in death to appellee Brillhart's decedent and injury to appellee Walter C. Young. Immediately after the accident, appellees filed separate actions against Cooper-Jarrett to recover damages in the Circuit Court of Jackson County, Missouri. Central was tendered the defense of the suits, but declined on the ground that the accident was not within the coverage of the policy. Cooper-Jarrett thereupon employed attorneys, who filed answers traversing the allegations of the respective petitions.

In 1937 Central became insolvent and was liquidated in the Circuit Court of Cook County, Illinois. An order was entered restraining all claimants from prosecuting actions against it. No claims were filed by appellees with the receiver of Central and any liability against it on the policy has been extinguished.

Subsequent to the receivership of Central, Cooper-Jarrett undertook reorganization proceedings under Section 77 B of the National Bankruptcy Act. Appellees both filed

their claims in this proceeding. Thereafter, on April 1, 1939, the bankruptcy court entered an order permitting them to withdraw their claims and prosecute their action in the District Court on the ground that Cooper-Jarrett had [fol. 46] insurance. The attorneys who had filed answers for Cooper-Jarrett in the damage actions withdrew September 30, 1937. No other attorneys were employed thereafter by Cooper-Jarrett to represent it in the pending actions. On April 22, 1939, default judgments were entered by the Circuit Court of Jackson County, Missouri, against Cooper-Jarrett and in favor of appellee. After the default judgments, garnishment proceedings were instituted against Central, in violation of the order of the Circuit Court of Cook County, by summons delivered to the Superintendent of Insurance of Missouri. Judgment was entered in favor of appellee Young in these proceedings on February 9, 1940, and also apparently in favor of appellee Brillhart on June 28, 1940.

At no time was appellant ever notified by Central of the accident or of the suits filed in the Cook County Court. The first notice of any kind it ever received was in a letter from Frank P. Barker, attorney for Cooper-Jarrett in the reorganization proceedings, on February 9, 1939. In this letter Barker stated that he had learned that appellant had reinsured Central's risk and asked confirmation thereof. He listed the cases pending against Cooper-Jarrett, including those of appellees. Appellant replied that it had no knowledge of these cases and referred him to the receiver for Central.

Appellant filed its bill of complaint against appellees April 10, 1940, in the District Court of the United States for the District of Kansas, seeking a declaratory judgment determining its liability to them under the reinsurance contract between it and Central. It is not necessary to set out the allegations of the bill of complaint. It contained the usual allegations found in such an action. The bill clearly stated a justiciable controversy. Nor is it claimed by appellees that there was a failure to state a justiciable controversy. The assertion rather is that an action was pending in another forum in which the rights of the parties might have been settled and that therefore the trial court acted within its discretionary powers in dismissing the declaratory judgment action and requiring the parties to litigate their rights in the other pending action.

Ordinarily a court having jurisdiction of the subject mat-

[fol. 47] ter and over the parties to a justiciable controversy must exercise that jurisdiction. This is, however, not an absolute mandate and the court has some discretionary power as to whether it will in each instance assume and exercise the jurisdiction which the statute confers. Kansas City So. Ry. Co. v. United States, 282 U. S. 760, 763, 51 S. Ct. 304, 306, 75 L. Ed. 684; Canada Malting Co. Ltd., v. Paterson Steamships, Ltd., 285 U. S. 413, 76 S. Ct. 413, 76 L. Ed. 837; American Automobile Ins. Co. v. Freundt, et al., 7 Cir., 103 F. 2d 613; United States Fidelity & Guaranty Co. v. Koch, 3 Cir., 102 F. 2d 288.

Where a prior action has been filed in a court of concurrent jurisdiction between the same parties and involving the same issues, and a decision by that court would adjudicate all the rights of the parties, a federal court, although having jurisdiction to entertain an action brought by a defendant in the pending cause, may within its discretionary powers refuse to entertain jurisdiction. Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F. 2d 321; Maryland Casualty Co. v. Consumers Finance Service, Inc., 3 Cir., 101 F. 2d 514; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 99 F. 2d 665.

But a federal court may not refuse to assume jurisdiction merely on the ground that another remedy is available or because another suit is pending, if the controversy between the parties will not necessarily be determined therein. Maryland Casualty Co. v. Consumers Finance Service, Inc., supra.

At the time appellant filed its action for a declaratory judgment, no action was pending in any court in which it was a party. No proceeding had been instituted in which its liability as a reinsurer of Central's risks was an issue. The only proceeding pending in any court was the garnishment action instituted by appellees in the District Court of Jackson County, Missouri, against Central; appellant was not a party to that cause. The liability of Central, if any, arose under the contract executed by it with Cooper-Jarrett, while the liability of appellant to appellees, if any, arose under a separate agreement between it and Central. The issues in the garnishment action could not deter-
[fol. 48] mine the liability of appellant under its reinsurance contract.

The intent of Congress in passing the declaratory judgment act was to afford one who is threatened with liability an early opportunity to determine his rights by forcing his adversary to come into court and assert his claim, without waiting until it pleased him to institute an action to recover, and thus minimize the danger of loss. E. Edelmann & Co. v. Triple-A Specialty Co., 7 Cir., 88 F. 2d 852; Milwaukee Gas Specialty Co. v. Mercoid Corp., 7 Cir., 104 F. 2d 589.

The situation in which appellant found itself was squarely within the purview of the act. It was faced with a possible claim of liability on its policy of reinsurance. In fact, appellees now claim that appellant is liable to them. No claims had been asserted against it; no suit had been filed in any court seeking to hold it liable; but the contingent liability was there. It was not compelled to await the time and pleasure of appellees in instituting their action. It had a clear right to go into a federal court of competent jurisdiction, which had jurisdiction over appellees, and ask that they be compelled to come in and assert their claims.

The trial court exceeded its discretionary powers in dismissing appellant's bill of complaint. The cause is therefor reversed and remanded with directions to reinstate the bill of complaint and proceed with the determination of the issues.

Reversed and remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—June 23, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

[fol. 49] On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that the cause be and the same is hereby remanded to the said district court with directions to reinstate the bill of complaint and proceed with the determina-

tion of the issues; and that The Excess Insurance Company of America, a corporation, appellant, have and recover of and from Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, and Walter C. Young, appellees, its costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTE RE FILING OF PETITION FOR REHEARING

[In conformity with the written direction of counsel, the petition for rehearing filed July 23, 1941, is omitted from the record to accompany a petition for writ of certiorari.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—August 28, 1941

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION BY APPELLEE, DEWEY BRILLHART TO STAY MANDATE—Filed September 5, 1941

Comes now the above named Appellee herein and respectfully moves the court for the stay of a mandate in said cause and in support thereof says:

(1) That on the twenty-third day of June, 1941, an order and judgment was made and entered by this court reversing the judgment of the District Court of the United States for [fol. 50] the District of Kansas, Third Division, in favor of Appellee, whereby the petition of the above named Appellant herein was dismissed; that thereafter Appellee filed a petition for rehearing in due time and on the twenty-third

day of July, 1941, together with his suggestions in support thereof, and that on the twenty-eighth day of August, 1941, said petition for rehearing was denied.

(2) That this Appellee intends to, and will, file a petition in the Supreme Court of the United States within the time provided by law for the issuance of a writ to require by certiorari that said cause be certified to the Supreme Court of the United States for determination by it as provided in Sec. 240 of the Judicial Code of the United States, being Sec. 347, Code of Laws of the United States, 1934 Ed., and amendments thereto, and of Title 28, U. S. C. A.

Wherefore, this Appellee prays that an order for a stay of the mandate and of the execution and enforcement of the judgment of this court and all proceedings now pending herein in this cause be entered by this court, and if any certification of the judgment of this court to said District Court of the United States for the District of Kansas, Third Division, or the issuance of such mandate has been made, that the same be recalled and that said stay of the mandate be effective for the period of time within which Appellee is permitted to petition the Supreme Court of the United States for the issuance of its writ of certiorari and that if a writ of certiorari be granted by the Supreme Court of the United States in this cause that said mandate be further stayed until said cause has been disposed of by the Supreme Court of the United States.

Clarence C. Chilcott, 918 Scarritt Bldg., Kansas City, Mo.; Stuart T. McAlister, Ratner, McAlister & Mattox, Parsons, Kansas, Attorneys for Appellee.

Receipt is hereby acknowledged of service upon Appellant of the above and foregoing motion for an order for the [fol. 51] stay or recall of this court's mandate, in the above entitled cause, this fourth day of September, 1941.

Paul R. Stinson, First National Bank Bldg., Kansas City, Mo.; Dick H. Woods, First National Bank Bldg., Kansas City, Mo.; Louis R. Gates, Commercial National Bk. Bldg., Kansas City, Kansas, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—September 5, 1941

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 5, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

Endorsed on cover: File No. 46,100. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 772. Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner, vs. The Excess Insurance Company of America. Petition for a writ of certiorari and exhibit thereto. Filed November 27, 1941. Term No. 772, O. T. 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 10TH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CLARENCE C. CHILCOTT,
918 Scarritt Building,
Kansas City, Missouri,
STUART T. MCALISTER,
Parsons, Kansas,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, for a writ of certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit to bring before the Supreme Court the case of *The Excess Insurance Company of America, a corporation, Plaintiff-Appellant, vs. Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, Defendant-Appellee.*

Said petitioner respectfully shows to this Honorable Court as follows:

SUMMARY STATEMENT.

The proper interpretation of the Declaratory Judgment Act (Judicial Code, Sec. 274d, 28 U.S.C.A. 400), is involved in this law suit. (See Appendix A.)

The opinion of the Tenth Circuit Court of Appeals (R. 44) is erroneous in the following respects:

(a) It holds that the District Court must determine the issues in a declaratory judgment suit even though the law of Missouri provides another more appropriate, more suitable and more effective statutory remedy (R. S. Mo. 1939, Sections 1590 and 6009, being Revised Statutes, 1929, Sections 1396 and 5898, respectively; see Appendix B); and that under such circumstances the District Court, after becoming familiar with the pleadings and after hearing the statements of the respective parties as to the facts, cannot, in its discretion, refuse to entertain a bill for a declaration.

(b) It involves a misconception of the source of liability of The Excess Insurance Company of America to Petitioner.

(c) It misconceives the law in holding that the Circuit Court of Jackson County, Missouri, could not determine the liability of The Excess Insurance Company of America to Petitioner.

(d) It is conflicting and self-contradictory in holding that District Courts, while having jurisdiction to determine actions pending in courts of concurrent jurisdiction between the same parties involving the same subject-matter, and where the decision of the District Court

could adjudicate all of the rights of the parties may, within its discretionary powers, refuse to entertain jurisdiction, and at the same time holding that the District Court for the District of Kansas did not have such discretionary powers in this case under identical circumstances.

(e) It holds that a cause may be removed on execution and garnishment from the state court of Missouri to a federal court in Kansas by way of a declaratory judgment suit when such cause was not otherwise removable under the removal statutes and thereby attempts to enlarge the jurisdiction of Federal Courts beyond the limits prescribed by the removal acts, and the adjudicated cases under the Declaratory Judgment Act.

QUESTIONS PRESENTED.

(1) Do District Courts enjoy a measure of discretion in the matter of granting or withholding declaratory relief?

(2) Does the existence of an equivalent adequate remedy in a case already pending in a state court, in which all of the relief sought in the District Court could be obtained in a single simple procedure in the state court, authorize the exercise of discretion to refuse relief under the Declaratory Judgment Act?

(3) May a cause pending in a state court of Missouri be removed therefrom to the United States District Court for the District of Kansas by way of a proceeding under the Declaratory Judgment Act?

REASONS FOR THE WRIT.

(1) The scope of the Declaratory Judgment Act and the meaning of Rule 57 of the Rules of Civil Procedure for the District Courts of the United States are both here involved. Both are in the foreground of developing tendencies of the law and are of great general importance and interest and their application to cases involving proceedings in state courts should be determined and settled by this court.

(2) The opinion of the Court of Appeals is in conflict with the Fourth, Seventh and Eighth Circuits and said conflict should be heard and determined by this court.

(3) The Court of Appeals has decided a question of local law in a way probably in conflict with applicable local decisions.

(4) The Court of Appeals has decided an important question of Federal law which has not been but which should be settled by this court.

(5) The Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court.

The decision of the Circuit Court of Appeals is in conflict with the following cases:

Aetna Casualty & Surety Co. v. *Quarles*, 92 Fed. (2d) 321 (CCA 4, 1937).

American Automobile Insurance Co. v. *Freundt*, 103 Fed. (2d) 603 (CCA 7, 1939).

Thompson v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940).

State Farm Mutual Insurance Co. v. *Hughe, et al.*, 115 Fed. (2d) 298 (CCA 4, 1940).

BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, as amended by Act of Congress February 13, 1925, Chapter 229, 43 Stat. 938 (28 U.S.C.A. 347).

The judgment of reversal sought to be reviewed was rendered on June 23, 1941 (R. 44), the motion for rehearing was denied August 28, 1941 (R. 49), and Petitioner files his petition for writ of certiorari within three months from August 28, 1941.

This action was based upon the laws of the United States, to-wit, the Declaratory Judgment Act, being Section 274d of the Judicial Code (28 U.S.C.A. 400, see Appendix A), and the lower court decided questions of substance involving matters of law, erroneously it is believed.

The following cases it is believed sustain the jurisdiction of this court to issue its writ of certiorari:

Worcester County Trust Co. v. *Riley*, 58 S. Ct. 185, 302 U. S. 292, 82 L. ed. 268.

Gay v. *Ruff*, 54 S. Ct. 608, 292 U. S. 25, 78 L. ed. 1099.

Electrical Fittings Corp., et al., v. *Thomas & Betts Co., et al.*, 59 S. Ct. Rep. 860, 307 U. S. 241, 83 L. ed. 1263.

Prayer.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify

and send to this court for its review and determination on a day certain therein named a full and complete transcript of the record and proceedings in the case of The Excess Insurance Company of America, a corporation, Appellant, vs. Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Appellee; No. 2223, to the end that this cause may be reviewed and determined by this court as provided for in the statutes of the United States, and that said decree and judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court and that of the District Court affirmed, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE C. CHILCOTT,
STUART T. MCALISTER,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Tenth Circuit was rendered June 23, 1941, appears in the record at page 44, and is reported in 121 Fed. (2d) 776. Petition for rehearing was filed July 23, 1941, and denied August 28, 1941. Petitioner's motion to dismiss in the District Court appears at page 19 and the order of the court sustaining the same at page 42 of the record.

JURISDICTION.

The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code as amended by Act of Congress February 13, 1925, Chapter 229, 43 Stat. 938 (28 U.S.C.A. 347).

STATEMENT OF THE CASE.

The District Court granted petitioner's motion to dismiss after a consideration of the pleadings and hearing the statements of fact and arguments of respective counsel (R. 42).

The pertinent portions of the motion to dismiss (R. 19-20) so far as applicable to this proceeding are as follows, to-wit:

> "1. Because all matters and issues involved herein are involved in and fully determinable by the garnishment proceedings already pending and in progress on a judgment in the state court of Missouri at the time that the action herein for declaratory relief was commenced.
>
> 2. Because under the allegations of plaintiff's complaint a proper cause for declaratory relief is not stated or shown, and the court should exercise its judicial discretion not to entertain said suit;
>
> (a) Because plaintiff herein is merely attempting to have the court anticipate and decide issues involved and fully determinable in proceedings already pending and in progress in the Circuit Court of Jackson County, Missouri, at Independence;
>
> (b) Because the plaintiff herein is attempting to remove a cause from a state court into a Federal Court contrary to the provisions of the removal act;
>
> (c) Because the plaintiff herein is merely attempting to have this court act as a court of appeals

and review the proceedings had in the Circuit Court of Jackson County, Missouri, at Independence;

(d) Because the plaintiff is attempting to remove a cause from the Circuit Court of Jackson County, Missouri, to the Federal Court for the District of Kansas in violation of the removal act as such cause could only be removed to the Federal Court for the Western Division of the Western District of Missouri.

3. Because a declaratory judgment will not finally settle and dispose of the alleged controversy between plaintiff and this defendant concerning the question of the liability of the plaintiff under the policy as garnishment proceedings are pending in three other cases, identical with the one herein, in the Circuit Court of Jackson County, Missouri, and adjudication by declaratory judgment herein would be merely deciding the question piecemeal.

4. Because the co-defendant herein, Walter C. Young, died before the institution of this action for a declaratory judgment, and his administrator, Carlton R. Benton, Public Administrator of Jackson County, Missouri, is a non-resident of this judicial district and beyond the reach of process of this court and a multiplicity of suits will therefore not be avoided by the rendition of a declaratory judgment herein.

5. Because all of the parties interested, namely, Carlton R. Benton, Administrator of the Estate of Ralph Russell Phillips, deceased, Rex Phillips, Cooper-Jarrett, Inc., and Central Mutual Insurance Company of Chicago, Illinois, are necessary parties to a complete and final determination of the plaintiff's rights in the premises and are not made parties to this suit."

The Court of Appeals reversed said ruling of the District Court and thereby held that the District Court

could not under the circumstances, exercise its discretion to decline to define and declare the rights of the parties in the premises.

Petitioner respectfully submits that his motion was properly addressed to the District Court's discretion; and that there being no abuse of that court's discretion the decision of the Court of Appeals should have been one of affirmance.

THE FACTS.

Respondent carried a liability insurance policy covering other liability insurance policies issued by the Central Mutual Insurance Company of Chicago, Illinois, which, in turn, covered trucks owned or leased by Cooper-Jarrett, Inc. (R. 6, 8, 9).

Petitioner's decedent was killed as the result of negligence on the part of said Cooper-Jarrett, Inc., in October, 1934, and on December 4, 1935, petitioner filed suit against Cooper-Jarrett, Inc., for the sum of $25,000.00 and obtained judgment against Cooper-Jarrett, Inc., on April 22, 1939, for the sum of $20,000.00 (R. 9). At the time of the filing of respondent's bill for declaratory relief petitioner was pressing and prosecuting his claims against respondent through the processes of legal and equitable garnishment, upon the judgment which had been obtained against Cooper-Jarrett, Inc., in the Circuit Court of Jackson County, Missouri (R. 9-16), and no claim was made in the bill or at the hearing, upon petitioner's motion to dismiss, that all the questions, both legal and equitable, presented by said bill could not be determined in the garnishment proceeding (R. 16).

At the time of the hearing upon the motion to dismiss petitioner's cause in the Circuit Court of Jackson County, Missouri, was pending upon the answer of the garnishee (the respondent herein) (R. 32), as stated by counsel for respondent at the hearing upon the motion to dismiss (R. 33).

The purpose of respondent in this suit was to have interpreted the contract between Central Mutual Insurance Company of Chicago, Illinois, and respondent (R. 34). The garnishment proceedings ran directly to respondent (R. 38) and there were four identical cases (including that of petitioner) pending in the Circuit Court of Jackson County, Missouri, in which garnishment proceedings are pending against respondent (R. 28, 32, 40), being the cases of petitioner, Young, Phillips and Benton (R. 41).

SUMMARY OF ARGUMENT.

(1) The peculiar appropriateness of the remedy provided by Missouri by Sections 1590 and 6009, Revised Statutes of 1939, being Sections 1396 and 5898, respectively, R. S. 1929, coupled with the peculiar circumstances attending the adjudication of this case, to-wit, the pending in the Circuit Court of Jackson County, Missouri, of an action in which all of the matters sought to be adjudicated could have been adjudicated as fully and completely as herein; the death of petitioner's co-defendant after judgment against Cooper-Jarrett, Inc., and prior to the filing of respondent's bill for declaratory judgment, and the appointment of a personal representative in Missouri beyond the jurisdiction of the District Court for the District of Kansas; the pendency of two additional suits

against respondent upon garnishment in the Circuit Court of Jackson County, Missouri, involving identical issues, thereby rendering it impossible for respondent to have its liability upon its contract finally adjudicated by the District Court of Kansas; and the filing and dismissal of a declaratory judgment suit in the United States District Court for the Western Division of the Western District of Missouri against all four defendants (R. 28, 32, 40, 41) make it clear that the District Court properly exercised its discretion in dismissing respondent's bill as no purpose could be served by attempting to invoke the Declaratory Judgment Act and only a multiplicity of suits created.

(2) The District Court was authorized to decline to entertain jurisdiction of respondent's bill because of the existence of a complete and adequate remedy in a case already pending in a state court.

(3) The bringing of a declaratory judgment suit was merely an attempt by respondent to oust the state court of jurisdiction, to create a conflict of jurisdiction, and attempt to remove a nonremovable case from a state court to a Federal court and particularly to a wrong Federal court.

ARGUMENT.

At the outset of this argument petitioner feels required to take sharp issue with the lower court's conclusions that the issues in the present litigation could not be decided in the garnishment proceeding. Said the lower court, referring to respondent (R. 47):

> "No proceeding had been instituted in which its liability as a reinsurer of Central's risks was an issue. * * *. The liability of Central, if any, arose under the contract executed by it with Cooper-Jarrett, while the liability of appellant to appellees, if any, arose under a separate agreement between it and Central. The issues in the garnishment action could not determine the liability of appellant under its reinsurance contract."

No authority is cited for this broad statement of the law and if the court's conclusion is correct that the liability of respondent could not be determined in the garnishment proceedings then as a matter of law the court could render no judgment against respondent in said garnishment proceedings and respondent would be bound to prevail. However, whether or not the above quoted statement of the lower court is correct is to be decided by the law of the forum where the garnishment proceedings were pending. The above excerpt was the foundation upon which the lower court based its conclusion that the District Court had exceeded its jurisdiction in dismissing respondent's bill and in reversing and remanding the cause. Therefore, if the converse of said quoted portion of the opinion is the law of the forum where the garnishment proceedings were pending and the issues in the garnishment proceeding could determine the liability of respondent to petitioner under its contract

with Central, it logically follows that the major premise of the opinion being wrong the lower court erred in holding that the District Court exceeded its discretionary powers in dismissing the bill and in reversing and remanding the cause.

The statutes of Missouri referred to, to-wit, Sections 1396 and 5898, R. S. Missouri 1929, *supra*, provide that after judgment for plaintiff has been rendered the judgment creditor in aid of execution may summon garnishees (Sec. 1396). In fact, under Sec. 1397, R. S. 1929, being Sec. 1561, R. S. 1939, it is the duty of the officer when directed by the plaintiff, his agent or attorney, to summon such garnishees. The garnishment proceeding is not an independent suit but is merely in aid of execution auxiliary to the main suit and cannot be removed into a Federal Court, *Brucker* v. *Georgia Casualty Co.*, 14 Fed. (2d) 688 (D.C. E.D. Mo. E.D., 1926). *Russell* v. *Zurick Accident & L. Ins. Co.*, 14 Fed. (2d) 688 (D.C. E.D. Mo. E.D., 1926). *First National Bank* v. *Turnbull*, 16 Wall. 190, 21 L. ed. 296. *Mutual Reserve Fund L. Assn.* v. *Phelps*, 190 U. S. 147, l. c. 159, 47 L. ed. 987. *Godman* v. *Gordon*, 61 Mo. App. 685. *Tinsley* v. *Savage*, 50 Mo. 141. It retains the case's original number and comes on for hearing immediately after issue is joined, thus operating to effect an advancement of the hearing automatically. The entire file and docket is before the court. There is thus one file, one docket, one number, and one case. The garnishment proceedings are merely a continuation of the original cause in aid of execution and are so related thereto that it is fitting and proper that the District Court recognize the peculiar appropriateness of the statutory remedy.

The policy of the State of Missouri as established by Sections 1396 and 5898-9, R. S. 1929, being Sections

1560 and 6009-10, R. S. 1939, is to associate procedural litigation seeking to apply the proceeds of an insurance policy to the payment of a judgment with the litigation producing that judgment. This is an established policy of the State of Missouri as manifest by a long line of cases.

Goerss v. *Indemnity Co. of America*, 223 Mo. App. 316, 3 S. W. (2d) 272; Certiorari quashed *State ex rel. Indemnity Co. of America* v. *Dawes*, 321 Mo. 1035, 13 S. W. (2d) 1059.

Kurre v. *Indemnity Co. of Galveston, Texas*, 223 Mo App. 406, 17 S. W. (2d) 685.

Graff v. *Continental Auto Ins. Underwriters*, 225 Mo. App. 85, 35 S. W. (2d) 926.

Cowell v. *Employers Indemnity Corp.*, 326 Mo. 1103, 34 S. W. (2d) 705.

Frohoff v. *Casualty Reciprocal Exchange*, 113 S. W. (2d) 1026.

Walker, to Use of Forestel, v. *American Automobile Ins. Co.*, 229 Mo. App. 1202, 70 S. W. (2d) 82.

This policy should be respected in considering the application or non-application of the Declaratory Judgment Act. Certainly such a state policy is ample justification for the denial of declaratory relief in such a case as this. To hold otherwise would not be in accordance with the spirit underlying *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. Rpr. 87, ... L. ed. ....., and *Stoner* v. *N. Y. Life Ins. Co.*, ... U. S. ....., 61 S. Ct. 336, 85 L. ed. 275. It would be contrary to the general purpose of the Declaratory Judgment Act to reduce litigation and its costs. It has been uniformly held that said act must be construed to effectuate its purpose.

It is the policy of the courts of this country to compel the insurer to answer for the insured's liability.

General Accident Fire & Life Assur. Corp. v. *Butler's Ice Cream Factory* (Tex. Civ. App.), 291 S. W. 674; *Matter of Empire State Surety Co.*, 214 N. Y. 553, 108 N. E. 825; *St Louis Dressed Beef & Provision Co.* v. *Maryland Casualty Co.*, 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712; *Juskiewicz* v. *New Jersey Fidelity & Plate Glass Ins. Co.*, 210 App. Div. 675, 206 N. Y. S. 566; *Kinnan* v. *Hurst Co.*, 317 Ill. 251, 148 N. E. 12; *Sanders* v. *Frankford Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485, 57 A. 655, 101 Am. St. Rep. 688; *Patterson* v. *Adan*, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184; *Reilly* v. *Linden*, 151 Minn. 1, 186 N. W. 121; *Griffin* v. *General Casualty & Surety Co.*, 231 Mich. 642, 204 N. W. 727; *Stephens* v. *Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478; *Davies* v. *Maryland Casualty Co.*, 89 Wash. 571, 154 P. 1116, 155 P. 1035, L. R. A. 1916D, 395, 398; *Maryland Casualty Co.* v. *Peppard*, 53 Okl. 515, 157 P. 106, L. R. A. 1918E, 597.

Where there is an existing suit in which the questions could be decided descretion might warrant the denial of relief, *Aetna Life Ins. Co.* v. *Haiwarth*, 300 U. S. 227, 57 S. Ct. 461, 463, 81 L. ed. 617, 108 A. L. R. 1000; *U. S. F. & G.* v. *Koch*, 102 Fed. (2d) 288, 123 A. L. R. 279 (CCA 3, 1939). In the case of *Aetna Life Insurance Co.* v. *Haworth*, it is significantly stated, l. c. 463:

> "Defendants have not instituted any action wherein the plaintiff could have an opportunity to prove the absence of the alleged disability."

In other words, if an action had been pending in which the matters submitted in the Haworth case should have been submitted the court would have exercised a sound discretion in dismissing the bill. In the present case there was an action pending in which all of the matters complained of in respondent's bill could have been decided without recourse to another court. Furthermore, a petition for a declaratory judgment filed after the commencement of a suit in another court, the determination of which will ultimately decide the liability of the party petitioning for the declaration should be dismissed, *U. S. F. & G.* v. *Koch*, 102 Fed. (2d) 288, 123 A. L. R. 279, CCA 3, 1939; *Aetna Casualty & Surety Co.* v. *Quarles*, 92 Fed. (2d) 321, CCA 4, 1937; *Aetna Casualty Co.* v. *Yeatts*, 99 Fed. (2d) 665, CCA 4, 1938; *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613, CCA 7, 1939.

The principles governing the rendition of declaratory judgments are set forth by Professor Borchard in his work at pages 107-11, as follows, to-wit:

> "• • • The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declarations prayed. In addition, and perhaps as indicating when a useful purpose will not be served, statute and practice have established the rule that the judgment may be refused when it is 'not necessary or proper at the time under all the circumstances.'
>
> "• • •

"The uncertainty would not be terminated where the proceedings indicate the absence or failure to join necessary parties in interest who ought to be heard or bound. * * *

"On the ground that the uncertainty would not be terminated, the courts usually refuse to make declarations where they consider that further proceedings are necessary to enable the plaintiff to obtain the relief he needs or to make the judgment effective.

"* * *

"Reference will hereafter be made to the fact that the court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances. * * *

"* * *, it serves no sensible end to permit a plaintiff to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponents *pending* or *immediate* action. * * *

"The declaration will be refused where in the court's opinion it is expedient, for some reason outside the record, such as public policy, or *where the question might be raised again in some other way* or where it would be *embarrassing in the operations of government*. It may also be refused where by laches or default or inequity the plaintiff has weakened his claim to relief. * * *"

And, further, on page 155, he said:

"* * *. If the court believes that a pending suit will better settle the issue or that a declaration will not satisfactorily dispose of the case or *satisfy*

the plaintiff's needs or the demands of public policy, it may in its discretion withhold the declaration."

On pages 179-182, he said:

"* * *, where a suit or proceeding is already *pending involving the same issues,* it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit, * * *. The first court seized of the issues involved, if identical whether by action for a declaratory or other judgment must be permitted to retain jurisdiction of the case. Nor as already observed, will the court permit a special tribunal having statutory jurisdiction of the express type of case *sub judice* or given jurisdiction by agreement of the parties to be ousted of its jurisdiction by a petition for a declaration in the ordinary courts. *Nor will a final judgment generally be permitted to be opened or even questioned or, as a rule, clarified by a collateral suit for a declaration* * * *. *The declaratory action is not a substitute for a new trial or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon.*"

"On the other hand there may occasionally be a sound reason why an executory action or non-declaratory action is given preference over a suit for a declaration, either because the declaration will not completely dispose of the issue or because the court believes coercive relief or a different form of action better suited to the plaintiff's need. * * *" (Italics ours.)

Under the law of the State of Missouri the question of respondent's liability can be fully determined in a garnishment proceeding, because the plaintiff's rights are founded upon those of the defendant and can rise no higher than the defendant's rights and any defense which

the garnishee (respondent) could assert against defendant, Cooper-Jarrett, Inc., can also be asserted against petitioner, Drake on Attachments, Sections 517 and 672, pages 456 and 602 (6th Ed.); *McDermott* v. *Donegan*, 44 Mo. 85, 89; *Cowell* v. *Employers Indemnity Corp.*, 326 Mo. 1103, 34 S. W. (2d) 705; *Walker to Use of Foristel* v. *American Auto Ins. Co.*, 229 Mo. App. 1202, 70 S. W. (2d) 82; *Graff* v. *Continental Auto Underwriters*, 225 Mo. App. 85, 35 S. W. (2d) 926; *Brandom* v. *Power*, 224 Mo. App. 858, 41 S. W. (2d) 879; *Cook* v. *McCoy*, 118 S. W. (2d) 1043 (not officially reported); *Peoples Bank* v. *Hoppe, et al.*, 111 S. W. 1190, l. c. 1192 (not officially reported); *Johnson* v. *Geneva Publishing Co., et al.*, 122 Mo. 102, 26 S. W. 676; *Wehrhan* v. *Fort Dearborn Casualty Underwriters of Chicago (Monehan, Garnishee)*, 221 Mo. App. 230, 1 S. W. (2d) 242, l. c. 243.

To recover against a garnishee plaintiffs must prove facts which would enable the alleged defendant debtor to maintain a suit against the garnishee. *South Central Securities Co.* v. *Vernon*, 227 Mo. App. 486, 54 S. W. (2d) 416. It is, therefore, seen that every issue concerning the liability of respondent to petitioner can be decided in the garnishment proceedings as fully and completely as it can in the present suit and it is clearly the duty of this court to give effect to the decisions of the appellate courts of the State of Missouri in arriving at its decision. Furthermore, the Missouri court has jurisdiction of petitioner, respondent, defendant and the Central Mutual Insurance Company of Chicago, and is, therefore, in a much better position than the District Court of Kansas to decide the issues involved.

The liability of the respondent in this case will not and cannot be finally determined in this action. Respondent is attempting a piecemeal adjudication of its liability. All the parties connected with this litigation and all the claimants under the policy and contract executed by the Excess and Central are not parties to this litigation and, consequently, their rights cannot be determined and, this being so, the liability of respondent is not determined; the rights of all interested parties are not determined, and respondent's bill was properly dismissed. A similar situation existed in the case of *State Farm Mutual Automobile Ins. Co.* v. *Hugee, et al.*, 32 Fed. Supp. 665, affirmed 115 Fed. (2d) 298, in which the District Court in commenting upon a similar situation said, l. c. 670:

> "To entertain jurisdiction would mean then the trial of all issues of fact relative to the liability of the bus companies, the bus driver, the truck driver, and Patton's, Inc., to the injured defendants, together with the accompanying questions of the extent of injury to each. How would the Court approach this tremendous task? Twelve people with different injuries, different doctors, it is assumed, and different lawyers. Testimony would be prolix, cross examination and argument of counsel interminable. Only the question upon the coverage should be cognizable in the declaratory action. Should the Court first go into this issue bringing all parties to a trial first upon the question of whether or not McRae at the time was acting within the scope of his employment? Should the jury answer 'No,' of course Patton's Inc., and the plaintiff would be eliminated in so far as any liability existed on the part of Patton's Inc., but, should the jury answer 'Yes,' then every one must come back into Court for another trial which would then be a straight tort action in which the plaintiff would really have no place, for the fact of insurance would be before the jury with no liability on the part of the

plaintiff to the injured defendant unless Patton's Inc., became insolvent and only then after judgment recovered."

A similar situation also existed in the case of *Lewis* v. *United Air Lines Transportation Corp.*, 34 Fed. Supp. 124, D. C. D. Conn. 1939, where, at page 125, will be found a lucid and able discussion of the elements to be considered in entertaining jurisdiction for a declaratory judgment in the case against some but not all of several injured persons. In this case Young was improvidently made a party after his death and certainly it cannot be contended that the rights of his personal representative can be adjudicated herein, although the opinion below appears to assume he is a party and an appellee. It will necessarily be adjudicated in the Circuit Court of Jackson County, Missouri, as will be the rights of the other claimants against respondent. All of the interested parties should be present in this litigation and there can be no final determination of respondent's rights or liability until they are all present in one action. It has been held that no judgment or decree will be rendered when all the parties who will be adversely affected are not before the court. *N. C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. Rep. 345, l. c. 347.

Conflict Between Jurisdictions.

The opinion of the lower court is not only directly in conflict with the cases of *Aetna Casualty & Ins. Co.* v. *Quarles*, 92 Fed. (2d) 321 (CCA 4, 1937), *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 603 (CCA 7, 1939), and *Thompson* v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940), but is an attempt by the respondent by indirection to remove into a Federal Court a cause pending in a state

court which was otherwise not directly removable. Although these cases were called to the attention of the lower court a reference to the opinion will show that they were wholly ignored by said court. The Quarles and the Freundt cases are directly in point upon both the facts and the law. Both of these cases sought a declaration in regard to other suits then pending in state courts in which ancillary proceedings in aid of execution were to be prosecuted but which HAD NOT BEEN COMMENCED prior to the institution of the declaratory judgment action. In the Quarles case immediately after the institution of the main action the insurance company filed a suit for declaratory judgment, and, while said suit was pending, a judgment was rendered against the assured, whereupon, the judgment creditor brought an action at law against the company to recover the amount of the judgment under a provision of the policy permitting such suit under such circumstances and after the last mentioned action had been instituted a motion to dismiss, which had been filed by the defendants in the suit for declaratory judgment, was brought up for hearing and allowed upon the ground that the granting of a declaratory judgment was a matter resting in the court's sound discretion and that the situation was not one which justified the granting of the relief prayed in the exercise of that discretion, the court finding that the controversy sought to be adjudicated by the Declaratory Judgment Act was one that could more properly be adjudicated in the action at law which Mrs. Quarles had instituted and which the company saw *in prospect* when it filed its bill and that a declaration of the rights of the parties *would not necessarily dispose of the entire controversy.* In affirming the judgment of the lower court the Circuit Court of Appeals for the Fourth Circuit said, pages 323, 324:

> "The federal Declaratory Judgment Act * * * is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction. *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227. * * * This being so there is no ground for applying the settled rule, * * *, that the courts may not decline the exercise of jurisdiction conferred upon them. The question is not as to whether jurisdiction shall be assumed but as to whether, in exercising that jurisdiction, a discretion exists with respect to granting the remedy prayed for."

And further the court said, page 325:

> "It is well settled that the declaratory remedy should not be invoked merely to try issues or determine the validity of defenses in pending cases."

The court further, after quoting Professor Borchard (Declaratory Judgments, 107-109), said, page 325:

> "The court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, *where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstance.*" (Italics ours.)

The language and decision of the *Quarles* case is clear. Under it, petitioner's motion was correctly decided by the District Court, and the Court of Appeals, by its reversal, simply refuses to apply the doctrine of the *Quarles* case.

In the case of *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939), the insurer

allowed the state court case against the insured to go to judgment and after an attorney had been employed for the purpose of filing garnishment proceedings against plaintiff and while garnishment proceedings on the judgment against the insurer under the policy were threatening, BUT BEFORE THEY HAD BEEN INSTITUTED, the insurer filed a declaratory judgment suit in the federal court. The District Court, in sustaining the motion of the *insured* and the *judgment creditor* to dismiss, said:

> "The court being further of the opinion that each and all of the defenses alleged to exist appear to be available to the plaintiffs in the action now pending in the state court between the defendants, and that relief sought herein will interfere with an action which is now pending in the state court, and the court being of the opinion that this is not a proper case for declaratory relief because of the pendency of the action in the state court between the defendants Freundt and Michal; * * *."

The Circuit Court of Appeals for the Seventh Circuit affirmed the lower court and in the course of the opinion discussed the situation, l. c. 617, in the following language:

> "In the instant case the legal justification for refusal to exercise jurisdiction may be found in the legislative purpose of the grant of power as well as the more general considerations of comity as between federal and state courts. The Supreme Court has held that the Declaratory Judgment Act is not jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction. The roots of declaratory procedure are found in equity procedure, chiefly in the *quia timet* relief. *The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing*

either to secure delay or to choose a forum. It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act, and such would be the result in the instant case. As stated above the question which plaintiff is seeking to have determined in the instant declaratory suit can be settled in the *threatened* garnishment proceeding in the state court and the general rule as to removal in this type of proceeding is as follows: 'If under that law (state law) the garnishment does not partake of the nature of an independent litigation but is merely auxiliary to and a dependency of the main action, supplemental to that action and a means of securing a satisfaction of the judgment rendered therein. It is not within the removable suits * * *.' Such a proceeding is not considered a 'suit of a civil nature at law or in equity' within the meaning of the removal act.

"The precise question here presented has not been passed upon by the Supreme Court; but the decisions of state and lower federal courts almost uniformly hold that there is a measure of discretion. In an authoritative work it is stated that '* * * the court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances.' And in the same text, p. 110, it is stated that '* * * *where the defendant's action is about to begin or has begun*, it serves no sensible end to permit a plaintiff to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponents' *pending* or *imminent* action." (Italics ours.)

To the same effect is the case of *Thompson, et al.*, v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940), *supra*, which recognizes the principle declared in the Quarles and Freundt cases in the following language, l. c. 374:

> "* * *. It was not intended by the Declaratory Judgment Act to enable a party to obtain a change of tribunal and thus defeat the jurisdiction of the state court or 'accomplish in a particular case what could not be accomplished under the removal act.'"

Not only has respondent thus attempted to circumvent the removal statute but by its action and with the sanction of the lower court has removed the case into the United States District Court for the wrong district. Under the removal statute, Sec. 71, Ch. 3, Title 28, Code of Laws of the United States of America (Sec. 28 of the Judicial Code), the proper court to which this cause should have been removed would be the United States District Court for the Western Division of the Western District of Missouri, in which respondent originally filed a declaratory judgment action against all its judgment creditors as referred to aforesaid.

Conclusion.

Reference is made in the opinion to the fact that no claims were filed by petitioner with the receiver of Central. Of course, no claims were filed as petitioner had no standing to file a claim against Central until after he had obtained a judgment against Cooper-Jarrett and it could not proceed against Cooper-Jarrett so long as the organization proceedings of Cooper-Jarrett were pending under Sec. 77b in the National Bankruptcy Court or until after April 1, 1939, when the bankruptcy court entered an order permitting petitioner to withdraw his claim and prosecute it in the Circuit Court of Jackson County.

The court further criticizes petitioner for instituting garnishment proceedings against Central in violation of the order of the Circuit Court of Cook County and while this is immaterial, we think, in the present proceeding it might not be inappropriate to call the Court's attention to the fact that the courts of one state have a right to refuse to recognize an injunction issued by the courts of another state. *Cole* v. *Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 37 L. ed. 538. *Kepner* v. *C. C. C. & St. L. Ry. Co.*, 322 Mo. 299, 15 S. W. (2d) 825; certiorari denied 280 U. S. 564, 50 S. Ct. 24, 74 L. ed. 618. *Frye* v. *Ry.*, 157 Minn. 52, 195 N. W. 629; certiorari denied 263 U. S. 723, 44 S. Ct. 231, 68 L. ed. 525. *Shaw* v. *R. R.*, 314 Mo. 123, 282 S. W. 416.

The lower court seems to overlook entirely the fact that it was unnecessary that appellee obtain a judgment on its garnishment proceedings against Central Mutual before he could proceed against the respondent. The contrary was specifically held by the Supreme Court of Missouri in the case of *Homan* v. *Employers Reinsurance Corporation*, 345 Mo. 650, 136 S. W. (2d) 289, and was tacitly admitted by counsel for respondent in the oral argument in the District Court (R. 38) so that the judgment against Cooper-Jarrett was ripe for the commencement of garnishment proceedings against respondent on April 22, 1939, and respondent waited nearly a year before it began the present suit which is some indication that it was really not disturbed or seeking an early adjudication of its rights as intimated in the opinion.

The facts in this case and the legal principles applicable thereto are closely akin, in fact for practical purposes identical, to those in the case of *Employers Liability Assurance Corp., Ltd.* v. *Ryan*, 109

Fed. (2d) 690, CCA 6, 1940; certiorari granted 310 U. S. 621, 60 S. Ct. Rpr. 1097, in which the Supreme Court undoubtedly granted a writ of certiorari because of the conflict between the Ryan case and the Quarles case. The conflict between this case, the Ryan case and the Quarles case is accentuated by the opinions in the Freundt and Thompson cases referred to above. The Ryan case, which is the only case holding the same as the lower court herein, is opposed by the Circuit Courts of Appeals of three other circuits and a certiorari was granted in the Ryan case which was subsequently dismissed pursuant to Rule 35 of this court, which provides for a stipulation of dismissal by the parties specifying the terms as respects costs and the payment to the clerk of any fee that may be due him.

Sections 5898 and 5899, R. S. Mo. 1929, being Sections 6009-6010 (See Appendix B) R. S. Mo., 1939, are nearly identical with Sections 9510-3, 4, General Code of Ohio, and by judicial construction have been integrated with Section 1396, R. S. Mo. 1929, being Section 1560, R. S. Mo. 1939, as a cumulative remedy. *Lajoie* v. *Central Western Cas. Co. of Detroit, Michigan,* 228 Mo. App. 701, 71 S. W. (2d) 803-804.

In no case except the Ryan case has it been held that a District Court has no discretion to prefer a special statutory remedy to that of a declaratory judgment. The opinion of the lower court wholly overlooks the respectable authority contrary to its holding.

Petitioner respectfully submits that the District Court, having heard the case, properly exercised its discretion. If the proceedings under the Missouri statutes do not warrant the discretionary action taken by the District

Court, then that court has no discretion at all in such cases and such is the holding of the lower court herein. However, a substantial line of cases in addition to those cited herein recognizes such discretion as vested in the District Court. Certainly said cases cannot all be wrong and only this case and the Ryan case right.

The Declaratory Judgment Act should be construed to limit and not to increase litigation, to simplify and not complicate it. The present suit and the declaratory judgment suit instituted in the Western Division of the Western District of Missouri in addition to the proceedings under the state statutes have simply added the additional burden of a trial in the District Court and appeal to the Circuit Court of Appeals and of this petition to this Honorable Court. As construed by the lower court the Declaratory Judgment Act merely extended and increased the burden of litigation. Such was not its intention as may be seen by a reference to the Senate Judiciary Report No. 1005, 73rd Congress, 2nd Session, and Professor Borchard's work on Declaratory Judgments. If for no other reason certiorari should be granted to reconcile the conflicts between the holdings of the Circuit Courts of Appeals in the 6th and 10th Circuits and those of the 4th, 7th and 8th Circuits.

The judgment of the Court of Appeals should, therefore, be reversed and that of the District Court affirmed.

Respectfully submitted,

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APPENDIX A.

Declaratory Judgment Act.

Sec. 400, Title 28, Code of Laws of United States of America (Judicial Code 274d, 28 U.S.C.A. 400).

(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

APPENDIX B.

Sec. 1560, R. S. Mo. 1939, being Sec. 1396, R. S. 1929.

Sec. 1560. Who may be summoned as garnishees.—All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees.

Sec. 6009, R. S. Mo. 1939, being Sec. 5898, R. S. 1929.

Sec. 6009. Cancellation or annulment—when void.—In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death or damage to property by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid; occasioned by said casualty. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 772.

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES

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THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner hereby presents to the court his supplemental brief in further support of his petition for a writ of certiorari and to the merits thereof.

SUMMARY OF ARGUMENT.

I.

Respondent's position that "no suit was pending to which respondent was a party" is an admission that an action was pending at the time the bill for declaratory

judgment was filed in which respondent's liability could have been adjudicated, but seeks to avoid the effect of such pending action because it had not yet been summoned as a garnishee. This position is untenable if the principles applicable to the Declaratory Judgment Act are followed.

II.

Rule 57, Rules of Civil Procedure, does not and never did authorize the rendition of a declaratory judgment except in cases where it was *appropriate* and did not change the principle upon which the Quarles case was decided.

ARGUMENT.

I.

As to a Pending Case.

The bill embodying the Declaratory Judgment Act was before Congress several years before it was enacted into law on June 4, 1934, and was given lengthy and grave consideration by Congress before its enactment, see Congressional Record, February 1, 1930; Senate Report No. 1005, 73d Congress, Second Session, May 10 (Calendar day May 14), 1934.

A number of prominent lawyers and professors of law schools testified at committee hearings, including Professor Borchard, the "father" of the Act, *U. S. F. & G. Co.* v. *Koch*, 102 Fed. (2d) 288, l. c. 290 (CCA 3). At the time the bill was being considered the Senate Judiciary Committee had before it the uniform declaratory judgment act, which contained 16 sections. The report stated, page 6, Borchard p. 1048:

"The uniform act contains 16 sections, * * *. There seems no need for such an extensive Federal bill; * * *

"Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified."

The report also stated, page 6, Borchard p. 1047:

"The court has discretion, now hardened into a rule, not to issue a judgment if it will not finally settle the rights of the parties."

It appears that not only was Professor Borchard a witness before the Committee, but that he was active in securing the passage of the bill to such an extent that the committee report was prepared by him, Declaratory Judgments, Borchard, Second Edition, p. 312, Note 5.

On the same page Professor Borchard further states:

"The declaratory remedy is not like an ordinary equitable remedy in which the federal courts have on occasion remarked that when the plaintiff has the right to invoke the federal jurisdiction, the court is bound to take the case and proceed to judgment. Nor does the fact that the Report of the Judiciary Committee of the Senate makes no direct reference to the discretionary exercise of the power granted by the Federal Act militate against the rule of discretion."

On page 350 Professor Borchard states:

"Where an action or proceeding is already pending in another forum involving the same issues, it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit."

Again on page 653 he states:

> "The discretion to refuse to exercise federal declaratory jurisdiction is properly applied when a state action is already pending which can easily adjudicate the entire issue between and among all the parties in interest;"

And on page 659:

> "Where identical issues and parties are involved in the state suit and no practical or useful purpose can be served by deciding the case in the federal courts, it is wise policy, especially since the tendency evidenced in *Erie Railroad* v. *Tompkins*, not to exercise the court's admitted jurisdiction."

Professor Borchard is probably the greatest authority on declaratory judgment law in the United States, and his latest work, Second Edition (1941), has been revised and rewritten in the light of the many decisions rendered and experiences had in the administration of the Federal Act. It also appears from the title page that he was co-draftsman of the Federal Rules and we believe his opinion is worth the consideration of this court upon the matters presented.

In the light of the principles referred to, an examination of the cases relied upon by respondent discloses that, with the exception of the case of *Employers Liability Assurance Corporation, Ltd.* v. *Ryan*, 109 Fed. (2d) 690 (CCA 6), certiorari granted June 3, 1940, 310 U. S. 621, 60 S. Ct. 1067, 84 L. ed. 1394, dismissed 311 U. S. 722, 60 S. Ct. 1007, 85 L. ed. 45, they are not applicable herein.

Respondent's Cases Distinguished.

The case of *Ohio Casualty Co.* v. *Gordon*, 95 Fed. (2d) 605 (CCA 10), when carefully analyzed and considered in connection with the holdings of other appellate courts, is not contrary to but in harmony with the cases of *Aetna Casualty & Surety Co.* v. *Quarles*, 92 Fed. (2d) 321 (CCA 4, 1937), and *American Auto. Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939).

Whether a garnishment proceeding is a continuation of the original cause of action, or a separate and independent remedy, is to be determined by the law of the state in which the original judgment was rendered. *Erie* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817; *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 85 L. Ed. 275, 61 S. Ct. 336; *American Auto. Ins. Co.* v. *Freundt, supra.*

On page 608 of the Ohio Casualty Ins. case reference is made to the provisions of the garnishment law of the State of Oklahoma, and two-thirds of a page consumed by quotations therefrom and cases construing the same.

The garnishment laws of the State of Oklahoma were adopted from the garnishment laws of the State of Kansas. See Oklahoma Statutes 1931, Vol. 1, Section 527, *et seq.*, Compiled Statutes of Oklahoma 1921, Section 340, *et seq.* It will be noted that Sec. 624, Chapter 3, Article 2, 12 Okla. Stat. Annotated, is exactly the same as Sec. 60-950, of the General Statutes of Kansas, Annotated, 1935, originally enacted in 1889, and is as follows:

> "Sec. 624. *Defendant May Answer for Garnishee or Garnishee for Defendant.* The defendant may in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any

garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment; or upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. The garnishee may, at his option, defend the principal action for the defendant, if the latter does not, but shall be under no obligation so to do."

It will further be noted that so far as this case, or the Ohio Casualty Ins. Co. case is concerned, that Sec. 625 of Chapter 3, Article 2, 12 Okla. Stat., is exactly as Sec. 60-951 of the General Statutes of Kansas.

The court, of course, will take judicial notice that Oklahoma was admitted to the Union long subsequent to that date.

The court, in the case of *Casualty Ins. Co.* v. *Gordon*, 95 Fed. (2d) 605, quotes Sec. 625 as follows:

"The proceeding against a garnishee shall be deemed an action by plaintiff against garnishee and defendant. • • •."

This being the same as Sec. 60-951 of the Kansas Statutes aforesaid, and having been adopted from the State of Kansas, the construction placed by the courts of Kansas upon this statute will be controlling, *Erie* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, *Stoner* v. *N. Y. L. Ins. Co.*, 311 U. S. 464, 85 L. ed. 275, 61 S. Ct. 336, *Nelson* v. *Stull*, 65 Kansas 585, 68 Pac. 617, and the case of *Swofford Bros. D. G. Co.* v. *John S. Britton D. G. Co.*, 9 Kansas App. 1, 57 Pac.

235, construes this statute as changing a garnishment proceeding, under the laws of the State of Kansas, from being merely an incident to the original action to a separate, independent and extraordinary remedy in the following language, l. c. 236, 237:

> "• • •. Section 1, c. 151, Laws 1889 (sections 227, 228, c. 95, Gen. St. 1897), relating to proceedings in garnishment, provides: 'Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person (excepting a municipal corporation), who shall be indebted to, or have any property, real or personal, in his possession or under his control, belonging to such creditor's debtor, in the cases, upon the conditions and in the manner hereinafter described.' The proceedings in garnishment, prior to the passage of this act, were merely an incident to that in attachment. Garnishment since is a separate, independent, provisional remedy, governed entirely by the act in question. This court, in the case of *Kellogg* v. *Hazlett*, 2 Kan. App. 529, 43 Pac. 989, said: 'As garnishment is a special and extraordinary remedy, it can be used only at the times and upon the grounds expressly authorized by statute. The statutory conditions for its exercise are conclusive, and exclusive of all others.' • • •"

See also the case of the *First National Bank of Fort Scott* v. *Elliott*, 62 Kansas 764, 64 Pac. 623, in which this statute was quoted and the garnishee considered and treated as a defendant.

Under the laws of the State of Oklahoma, Sec. 614, Chapter 3, Article 2, Oklahoma Statutes of 1931, it is necessary that the plaintiff file an affidavit and bond upon which a summons is issued to the garnishee and defendant. The form of summons is provided in Sec. 616 and Sec.

625, *supra*, provides that garnishment is an action by the plaintiff against the garnishee and the defendant. It is, therefore, quite plain that in the case of Ohio Casualty Co. vs. Gordon the court took into consideration the distinction between garnishment proceedings under the laws of the State of Oklahoma and garnishment proceedings under the laws of other states, and that by reason of the fact that under the laws of the State of Oklahoma garnishment proceedings constituted an entirely distinct and separate cause of action from that in which the plaintiff obtained his original judgment, the matters of defense set up by the plaintiff could not have been litigated in a garnishment proceeding if brought. Further, in the Ohio Casualty Ins. case the bill of complaint was never challenged by a motion to dismiss but the court's judgment was invoked by cross complaints which were filed by the defendants. The distinction between the case of *Ohio Casualty Co.* v. *Gordon, supra,* and the *American Automobile Ins. Co.* case v. *Freundt,* 103 Fed. (2d) 615, *supra,* is noted in the latter case, the court saying, l. c. 618:

> "In Ohio Casualty Ins. Co. vs. Gordon, an insured had caused injury to two persons. One insured obtained judgment and in garnishment obtained judgment against the insurer. The other injured person obtained judgment *but took no further steps;* and about two years afterwards the insurer sought a declaration of rights. The Court of Appeals held that certain issues presented in the declaration suit could not have been litigated in the prior actions, that the court *had jurisdiction* to declare the rights in respect thereto, and that the insurer 'was entitled to invoke' the Declaratory Judgment Act. The opinion discloses that the material consideration was that all the questions presented in the declaratory suit could not have been litigated in prior actions." (Italics ours.)

It is, therefore, quite apparent that in the Ohio Casualty Co. case there were issues which could not have been litigated in the prior (liability for instance) action, whereas, in this case, under the authorities cited in our original brief every defense is open to appellant. This was the position taken by the court, as it went to some length to explain the garnishment laws of Oklahoma, evidently in support of its jurisdiction. l. c. 608-9.

Respondent also relies upon the case of *Employers Liability Assurance Corp.* v. *Ryan*, 109 F. (2d) 690 (CCA 6, 1940); cert. granted, 310 U. S. 621, 60 S. Ct. 1067. In that case the judgment creditor sought to assert a judgment which he had obtained against the defendant's insurer, Employers Liability Assurance Corporation, under Sections 9510-3 and 9510-4, General Code of Ohio, Sec. 9510-4 reading as follows, to-wit:

> "Sec. 9510-4. *When judgment creditor entitled to have insurance money applied to judgment.* Sec. 2. Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against loss or damage at the time when the right of action arose, • • • if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in a legal action against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The learned Judge, who wrote the majority opinion, prefaced the same by the following:

> "Sections 9510-3 and 9510-4, of the General Code of Ohio permit an injured party a direct action

against his judgment debtors insurers after he has obtained a judgment against the insured."

It is, therefore, quite apparent, according to the conception of the majority opinion, that the same situation existed in the Ryan case as in the *Gordon* case, *supra*, to-wit, that the subsequent proceedings to enforce the judgment against the insurer were entirely separate and distinct causes of action and not a continuation of the original action against the assured. No other conclusion is possible and this is supported by the decision of the same court in the case of *Western Supplies Co.* v. *Freeman*, 109 F. (2d) 693, immediately following the Ryan case, in which the dismissal of plaintiff's bill was affirmed the court using the following language, l. c. 695:

"• • •

"The decision in *Employers' Liability Assurance Corp.* v. *Ryan, et al.*, 6 Cir., 109 F. (2d) 690, this day decided, is not at variance with the conclusion reached herein. In that case, no other proceeding was pending between the parties thereto, when the bill for declaratory judgment was filed, in which the same questions were involved."

The Freeman case is commented upon in connection with Professor Borchard's criticism of the Ryan case in Note 8 at page 313, Borchard Declaratory Judgments, Second Edition.

In the Ryan case there was a powerful dissenting opinion by Judge Allen, l. c. 692, as follows:

"Section 400, 28 U.S.C., 28 U.S.C.A., Sec. 400, provides that in cases of actual controversy the courts of the United States 'shall have power' to grant this relief. The relief prayed for hence is afforded not as a matter of right. *American Automobile Ins. Co.* v.

Freundt, 7 Cir., 103 F. (2d) 613; *E. W. Bliss Co.* v. *Cold Metal Process Co., supra.* The relief may be refused if it is sought merely to determine issues involved in cases *pending*. *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 3 Cir., 101 F. (2d) 514. The obvious intent of this provision was not to duplicate actions. It was to avoid delay and the accrual of damages against one uncertain of his rights and to promote an early adjudication of the controversy between the parties without waiting until one of them should see fit to begin suit for coercive relief after damages had accrued. *Davis* v. *American Foundry Equipment Co.*, 7 Cir., 94 Fed. (2d) 441, 115 A. L. R. 1486. It is a kind of expanded bill *quia timet*. *Meeker* v. *Baxter*, 2 Cir., 83 F. (2d) 183. • • •

As this is a bill in the nature of an equitable proceeding, the District Court correctly considered the facts, duly pleaded and presented in evidence, which had occurred subsequently to the filing of the petition, and exercised a sound discretion in dismissing the bill. *Aetna Casualty & Surety Co.* v. *Quarles*, 4 Cir., 92 F. (2d) 321; *United States Fidelity & Guaranty Co.* v. *Koch*, 3 Cir., 102 F. (2d) 288." (Italics ours.)

The soundness of the principles enunciated in the dissenting opinion must commend themselves to any court which seeks to avoid unnecessary litigation. If the principle laid down in the principal opinion in the Ryan case is to be the law, then all discretion is taken from the *nisi prius* judge, which is contrary to all interpretations of the Declaratory Judgment Act and the only case which so holds.

It is further significant that this court granted a writ of certiorari in the Ryan case, as aforesaid, which was dismissed pursuant to Rule 35, U.S.C.A., 310 U. S. 654, 60 S. Ct. Rpr. 1107. Rule 35 provides:

"Rule 35. Dismissing Cases in Vacation. Whenever the appellant and appellee in an appeal, or the pefitioner and respondent in a petition for or writ of certiorari, shall in vacation, by their attorneys of record, file with the clerk an agreement in writing that such appeal, petition for or writ of certiorari shall be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter such dismissal and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue on such dismissal without an order of the court. (See Rules 31 and 34.)"

We do not think it is stretching the imagination too far to conclude that in view of the fact that this court issued a writ of certiorari in the Ryan case, the insurance company preferred to have the interpretation of the Declaratory Judgment Act remain in the chaotic condition it is upon this point than to be finally settled by a decision of this court.

The Ryan case was criticized by Professor Borchard on page 313 of his work as follows:

"True, the mere availability of another remedy is not a ground for declining a declaration, but the actual pendency of a prior suit which could in one action settle the whole case and the interests of all the parties involved may for reasons of judicial economy be an adequate ground for not starting a second suit. Circuit Judge Simons' opinion in *Employers Liability Assurance Corp.* v. *Ryan* is in this respect questionable, for Rule 57 contemplated not that the declaration should be granted when complete adjudication could be afforded in a pending suit involving identical issues, but that the mere existence of a coercive remedy which might have been available was not to bar an action for a declaration."

The effect of the opinion is much weakened by the powerful dissenting opinion and the granting by this court of a writ of certiorari to review the same.

In the case of *U. S. Fidelity & Guaranty Co.* v. *Koch*, 102 Fed. (2d) 288 (CCA 3, 1939), it is difficult to determine upon what basis the court did reverse and remand the case. The principal reason appears to be because the District Court apparently held that the defendant-appellee was entitled to a jury trial and that such could not be had under the Federal Declaratory Judgment Act. However, Professor Borchard seems to be of the opinion that special circumstances of unusual delay in the state proceedings persuaded the court to allow a federal declaratory action on the issue of coverage, Borchard 659, note 99.

In the case of *Western Casualty & Ins. Co.* v. *Beverforden*, 93 Fed. (2d) 166 (CCA 8, 1937), the issues were not at all similar to those herein. The questions of a pending action in which the issue could be decided, the removability of the cause to the Federal Court by way of a bill for declaratory judgment, the anticipation of a defense to the pending action, the peculiar statutory remedy provided by Missouri law, and attempting to have the Federal Court review the proceedings had in the Circuit Court of Jackson County, Missouri, were not in that case.

The Beverforden case was further considered, discussed, criticized and discounted in the later case of *American Automobile Insurance Co.* v. *Freundt, supra*, in which the court said:

> "The question of the exercise of the court's discretion was not raised in either the Beverforden or the Foulke cases and consequently they are no authority here."

The opinion in the Beverforden case is further weakened by the subsequent opinion of the same court in the case of *Thompson* v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940), which followed and quoted from the case of *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939).

In the case of *Aetna Life Ins. Co. of Hartford, Conn.* v. *Martin*, 108 Fed. (2d) 824 (CCA 8, 1940), the court, l. c. 827, specifically stated that the pendency of a prior action was not presented by the record and that therefore they would not consider whether or not the pendency of a prior action would preclude the right to maintain a declaratory judgment action.

That a case was pending in the Circuit Court of Jackson County, Missouri, in which repondent's rights could be determined cannot be gainsaid. Respondent does not directly state that all the issues could not be determined in the garnishment proceeding. It merely intimates that such is the case without disclosing any factual or legal basis therefor. As a matter of fact there is only one issue to be decided and, of course, such subsidiary issues as are connected with the main issue, and that is the liability of the respondent to the petitioner upon the judgment rendered in the Circuit Court of Jackson County, Missouri; that such case is a pending action was decided in the case of *Hill* v. *Martin*, 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. ed. 293, in which this court said:

> "That term ('proceedings') is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to

action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

This was commented upon favorably in the recent cases of *Toucey* v. *N. Y. Life Ins. Co.* and *Phoenix Finance Corp.* v. *Iowa-Wisconsin Bridge Co.*, Nos. 16 and 19, 62 S. Ct. 139 (not officially reported).

The case of *Maryland Casualty Co.* v. *Pacific Coal & Oil Co., et al.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. ed. 455, does not support the view of respondent. That was merely a case to determine whether or not the insurance company was bound to defend a cause of action brought against the assured, and inasmuch as this question could not be decided in such action the District Court was required to take jurisdiction.

II.

As to Rule No. 57.

Respondent by its argument under Point III admits the plain conflict between the Ryan case and the Quarles, Freundt and Thompson cases, but seeks to reconcile such conflict by the statement that the Quarles case was one of the earlier decisions dealing with the Federal Declaratory Judgment Act and that the principle enunciated therein had been superseded by Rule 57, Rules of Civil Procedure.

However, as the Freundt and Thompson cases were decided subsequent to the adoption of Rule 57, this reasoning cannot apply thereto and respondent shifts to the argument, in order to distinguish the Freundt case, by stating that "the only question properly before the Mis-

souri court in the garnishment proceeding is whether or not respondent owes Central, the judgment debtor." This, of course, is not true, the only question before the Missouri court being whether or not the respondent owed Cooper-Jarrett, Inc. This was conceded by the respondent at the hearing (R. 38), in which Mr. Woods stated to the court:

> "on May 29th of this year, summons and garnishment were issued by this defendant Brillhart and in the Young case also, against the plaintiff in this case. Of course, it ran—because of the judgments against Cooper-Jarrett and Central in the Brillhart case; since they had obtained no judgment against Centr —*it ran directly from Cooper-Jarrett to Excess.*" (Italics ours.)

Respondent, therefore, was outside the record when it stated that the only question properly before the Missouri court was whether or not respondent owed the Central, and this argument is self-contradictory because if the only question involved was whether or not respondent owed Central, that would be a matter in which petitioner would have no interest. The question involved is whether or not the respondent owed Cooper-Jarrett, Inc.; otherwise a garnishment proceeding could not be successfully asserted against respondent.

Rule No. 57 of the Rules of Civil Procedure provides in part that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." The opinion in the Ryan case was influenced by the conception that said rule was applicable even though the other "adequate remedy" may have been a special statutory remedy and even though such other remedy be more suitable and more appropriate.

Such an interpretation of the rule petitioner submits is erroneous and is in conflict with the Notes of the Advisory Committee on Rules, see Rule 57, Title 28, U.S.C.A., following Sec. 723c, where we find the following:

> "*A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case,* but general, ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.
>
> "* * *. The demand for relief shall state with precision the declaratory judgment desired, * * *. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the federal act. Compare *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000 (1937); *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191 (1933); *Gully, Tax Collector*, v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (CCA 5th, 1936); *Ohio Casualty Ins. Co.* v. *Plummer*, 13 F. Supp. 169 (S.D. Tex., 1935); Borchard, Declaratory Judgments (1934), *passim.*"

It will be noted that the term "appropriate" was used in the notes, evidently for some purpose, and such purpose was to give the court discretion to determine among other things its own jurisdiction and whether or not a case was one in which it should exercise such jurisdiction. Furthermore, as shown under Point I of this argument, it was the intention of Congress to apply the principles of the Uniform Declaratory Judgment Act in interpreting and administering the Federal Declaratory Judgment Act. This is commented upon by Professor Borchard in his work, referred to at page 313, as follows, to-wit:

"The declaratory remedy is not like an ordinary equitable remedy in which the federal courts have on occasion remarked that when the plaintiff has the right to invoke the federal jurisdiction, the court is bound to take the case and proceed to judgment. Nor does the fact that the Report of the Judiciary Committee of the Senate makes no direct reference to the discretionary exercise of the power granted by the Federal Act militate against the rule of discretion.

"While the Uniform Act contains a section expressly providing that the grant of a declaratory judgment is discretionary, and may be refused if it would not terminate the uncertainty or controversy giving rise to the proceeding, the reason was that it seemed necessary to write into the Uniform Act as much as possible of the established jurisprudence so as to guide state courts. But it was thought best to make the Federal Act a short one and to include only such provisions as were indispensable. *Hence, although discretion is not specifically mentioned, there was no intention to modify the established rules of law.* The Committee Note under Federal Rule 57 expressly provides that 'the Uniform Declaratory Judgments Act affords a guide to the scope and function of the federal act.'" (Italics ours.)

Also in footnote 8 on the same page (313), wherein the holding in the Ryan case is criticized, he said:

"Hence the final clause 'in cases where it is appropriate.' Judge Allen in dissent assumes that a state action was pending, in which supplementary proceedings involving the same issues could have been brought, hence that the declaration should have been declined."

NOTE: The Uniform Declaratory Judgment Act is set forth in the appendix at page 1039 and

Federal Rule 57 and Committee Note at page 1042 of Borchard on Declaratory Judgments, Second Edition.

In approving the holding of the Circuit Court of Appeals in the case of *American Automobile Insurance Company* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939), Professor Borchard said, p. 658:

> "So, where judgment had been recovered against the insured in an Illinois court and attorneys had been engaged to file garnishment proceedings against the insurance company, the federal court was right in refusing to exercise jurisdiction of a declaratory action of the company to establish non-liability, since the garnishment proceeding was ancillary to the original state action and the company's liability could be fully adjudicated in that proceeding."

And, further, in footnote 93 he mentioned the fact that such holding lent support to Judge Allen's dissent in the Rogers case.

It is plain that the conception of Rule 57 by the Circuit Courts of Appeal in the Ryan and present cases does violence to the settled rule that the Declaratory Judgment Act should be reasonably construed to effectuate its purpose to reduce litigation and to lighten its burdens.

Conclusion.

It appears to petitioner that the problem of finally determining the liability of respondent is impossible of solution in this case for two reasons:

First, because the policy of the law, as held by this court in the case of *Maryland Casualty Co.* v. *Pac. Coal*

& Oil Co., 312 U. S. 270, 274, 61 S. Ct. 510, 512, not to permit conflicting decisions and interpretations of evidence between federal and state courts in the same or companion cases would be violated herein if the companion cases of Young and the other judgment creditors of Cooper-Jarrett, Inc., should recover in the state court.

It would indeed be a novel situation if the petitioner herein be denied a recovery by a declaratory judgment of the District Court and his co-defendants in the dismissed declaratory judgment suit, filed in the federal court in Missouri, and the administrator of his co-defendant herein be permitted to recover in their garnishment proceedings against respondent when the relation of all of the Missouri judgment creditors was the same as regards Cooper-Jarrett, Central and respondent, which must be true, otherwise respondent would not have joined them as co-defendants in the Missouri suit. A similar situation existed in the case of *Jenkins* v. *Kurn*, 144 S. W. (2d) 76, reversed and remanded 313 U. S. 256, 61 S. Ct. 934. In that case the engineer was killed and the fireman injured in a collision. The administratrix of the engineer recovered a judgment which was affirmed by the Supreme Court of Oklahoma, *Kurn* v. *Reese*, Journal Oklahoma Bar Association, Volume No. 11, No. 20, pages 947-50 (not officially reported). Jenkins also recovered a judgment which was reversed outright by the Supreme Court of Missouri and this court issued its writ of certiorari and reversed and remanded the decision of the Missouri Supreme Court.

Second, a declaration should not be permitted if petitioner's understanding of the rule announced in the cases of *Toucey* v. *N. Y. Life Ins. Co.* and *Phoenix Finance*

Corp. v. *Iowa, Wisconsin Bridge Co.*, Nos. 16 and 19, respectively, 62 S. Ct. 139 (not officially reported), and *Southern Ry. Co.* v. *Painter*, No. 24, 62 S. Ct. 154 (not officially reported), is correct.

As a decree in a declaratory judgment proceeding is not coercive in its nature a judgment rendered therein could only be made effective by a plea of *res adjudicata* in a relitigation of the same subject matter, Borchard, pages 11 and 12. Assuming then that the District Court should render a declaration of non-liability of respondent, this would not prevent the prosecution of the garnishment proceedings already instituted in the state court, see Toucey and Phoenix cases above. Let us then assume that petitioner recovers against respondent on the garnishment proceedings in the state court. We then have the very situation condemned in the case of *Maryland Casualty Co.* v. *Pac. Coal & Oil Co., supra.* If both cases are affirmed on appeal we then have a situation similar to that in the case of *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 61 S. Ct. 336, 85 L. ed. 275, and as this court is bound to follow the state law the declaratory judgment would necessarily have to be reversed and the state court judgment affirmed upon certiorari. Another dilemma would exist if the declaration was rendered first, pleaded in bar in the state garnishment proceedings, disregarded by the state court, and a judgment for plaintiff affirmed by the state appellate court.

Under the *Stoner* and *Tompkins* cases, *supra*, the state appellate court must necessarily disregard the plea of *res adjudicata*, if in conflict with state law, and how could this court then hold that the declaration was *res adjudicata* as to the garnishment proceedings when the

state court had decided the matter contrary to the principles upon which the decision in the federal court was based. To hold otherwise would be to permit federal courts to place their own interpretation upon the laws and statutes of the state and thus to frustrate the state law and again bring into operation the practices which were condemned in the cases of *Erie R. Co.* v. *Tompkins* and *Stoner* v. *N. Y. Life Ins. Co., supra,* and evade the provisions of Sec. 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C., Sec. 725, 28 U.S.C.A. 725, which provides:

> "The laws of the several states except where the constitution, treaties or statutes of the United States otherwise require or provide shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

By its argument on pages 11 and 12 of its brief respondent admits that the garnishment proceeding in Missouri is a part and parcel of the original suit against Cooper-Jarrett. It is so held by this court in the case of *Hill* v. *Martin and Dorrance, et al.,* 296 U. S. 393, 403, 56 S. Ct. 278, 282, 80 L. ed. 293, and cited with approval in the *Toucey* and *Phoenix Finance Corporation* cases, *supra.* It cannot be that a declaratory judgment proceeding may permit a federal court to exercise an independent judgment as to what the law of a state is and thereby evade the statutory provisions and cases cited above, and thus mould the state law and circumvent the rule of the Tompkins and Stoner cases.

We respectfully, therefore, submit that the decree and judgment of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court and that of the District Court affirmed.

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FILE COPY

Supreme Court of the United States

October Term, 1941.

No. 772.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, Deceased, *Petitioner*,

vs.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Supreme Court of the United States

October Term, 1941.

No. ——.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, Deceased, *Petitioner*,

vs.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Opinion Below.

The final order of the District Court (R. 42) is unreported. The opinion of the Circuit Court of Appeals (R. 44-48) is reported in 121 F. (2d) 776.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 23, 1941 (R. 48). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Due to the omissions in petitioner's statement, respondent deems it necessary to make this additional statement of the facts.

Respondent filed its bill of complaint for a declaratory judgment in the District Court on April 10, 1940 (R. 4). Original federal jurisdiction affirmatively appeared, the complaint alleging diversity of citizenship and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3000 (R. 6). After the suit was filed, it was revealed that the defendant, Walter C. Young, had died and the cause proceeded against the remaining defendant, Dewey Brillhart, who is the petitioner here.

Respondent is a New York insurance company engaged in the business of reinsuring direct writing insurers. In the year 1932 respondent entered into a contract with Central Mutual Insurance Company of Chicago, Illinois (a direct writing insurance company), by the terms of which respondent agreed to repay any amount of ultimate net loss which Central might pay, over and above certain specified amounts, by reason of losses under public liability policies issued by Central during the life of the reinsuring agreement (R. 6, 7)[1]. This contract was signed by Central in Chicago, Illinois, and by respondent in New York City (R. 8).

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[1]The reinsuring clause of the contract provides: "Section I. The Reinsurer agrees to reinsure the Company (Central) as respects all third party automobile public liability policies, * * * and agrees to repay any amounts of ultimate net loss which the Company may pay in excess of the first Five Thousand Dollars ($5000) on account of any one person injured or killed and the first Ten Thousand Dollars ($10,000) on account of more than one person injured or killed in any one accident. * * *."

Section II. "The term 'ultimate net loss' shall be understood to mean and shall mean the sum actually paid in cash in settlement of losses for which the Company is liable, * * *." (R. 6, 7.)

In January of 1934 Central issued a policy of public liability insurance to Cooper-Jarrett, Inc., a motor freight carrier operating out of Kansas City, Missouri (R. 7, 8). By this policy Central agreed to insure Cooper-Jarrett against loss from liability imposed by law for damages on account of bodily injury, including death, occasioned by the ownership, operation or maintenance of certain motor vehicles described in the policy (R. 8).

In October, 1934, petitioner's decedent was killed in an accident that occurred in the state of Ohio while he was operating a truck leased by Cooper-Jarrett (R. 9). Immediately after the accident petitioner filed a damage suit against Cooper-Jarrett in the Circuit Court of Jackson County, Missouri, at Independence (R. 9). Central was tendered the defense of the suit, but refused to do so upon the ground that its policy did not cover the accident and the injury sustained. Cooper-Jarrett then employed counsel who filed an answer traversing the allegations of the petition (R. 9).

On January 11, 1937, Central was found to be hopelessly insolvent and the Circuit Court of Cook County, Illinois, in a statutory liquidation proceeding, entered an order directing the liquidation of the company and appointing Henry G. Miller, Esq., permanent receiver of all Central's assets. Within a few days the Illinois court made an order restraining and enjoining all persons from bringing, prosecuting or maintaining any action against Central except in that court. By another order it directed all claimants to present their claims to that court. Notices of the above order and proceedings were sent by the receiver to all known claimants and policyholders. Petitioner never filed any claim with the receiver, and there is no longer any liability on the part of Central or its receiver (R. 10).

Subsequent to Central's receivership and on May 14, 1937, Cooper-Jarrett, Inc., filed in the Federal District Court for the Western District of Missouri its petition for reorganization under the provisions of Section 77B in the Federal Bankruptcy Act (R. 10). Petitioner filed his claim in that proceeding, but on April 1, 1939, the Bankruptcy Court, upon *ex parte* application, permitted petitioner to withdraw his claim and prosecute his action in the Missouri state court on the ground that Cooper-Jarrett had insurance (R. 10, 11). April 1, 1939, the final decree in the 77B proceeding was entered and it, *inter alia*, fully and finally discharged Cooper-Jarrett from any claim or judgment that had been obtained or might be obtained by petitioner (R. 10, 11).

On April 22, 1939, a default judgment for $20,000 was entered by the Circuit Court of Jackson County, Missouri, against Cooper-Jarrett and in favor of petitioner. Almost two years before (September 30, 1937) the attorneys employed by Cooper-Jarrett had withdrawn and thereafter and at at the time the default judgment was rendered Cooper-Jarrett was without counsel and no defense was offered (R. 10).

Following the default judgment, petitioner attempted to serve (contrary to the existing orders of the Circuit Court of Cook County, Illinois) summons in garnishment upon Central by delivering copies thereof to the superintendent of insurance for the state of Missouri (R. 11). Final judgment for $22,100, by default, was entered against Central in this garnishment proceeding on June 28, 1940 (R. 38).

Respondent filed its bill of complaint for declaratory relief in the United States District Court for the District of Kansas on April 10, 1940 (R. 4). At that time respondent was not and never had been a party to any

of the proceedings against Cooper-Jarrett, Inc., or Central in the Missouri state court. Moreover, respondent had never been notified by Central either of the Ohio accident or of the claim and suit filed by petitioner against Cooper-Jarrett. This Central was obligated to do by the terms of the contract of reinsurance between it and respondent.[1] Central had also failed to notify respondent of the issuance of its policy to Cooper-Jarret, Inc., and had never filed a specimen copy thereof with respondent as it was required to do by Section V of the contract.[2] The first knowledge respondent ever had of petitioner's suit against Cooper-Jarrett was on February 9, 1939, when it received a letter from Frank T. Barker, Esq., the attorney for Cooper-Jarrett in the reorganization proceeding. In that letter Mr. Barker stated that he had learned respondent had reinsured Central, and requested confirmation of such information. He also listed the cases that were pending against Cooper-Jarrett, Inc., when the reorganization proceeding was instituted, and stated some had gone to judgment. Petitioner's case was included in that list. On February 20, 1939, respondent replied, stating that it had no record of such cases and referred Mr. Barker to the receiver for Central (R. 13).

After respondent filed this action for declaratory relief, and on May 25, 1940, the petitioner had summons in garnishment against respondent served on the superin-

[1] Sec. IX: "The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. * * *"

Sec. X: "The Company shall furnish the Reinsurer as soon after the first of the year as possible a list of outstanding claims in which the Reinsurer is interested, showing the amounts of loss reserves for each outstanding claim and the amount claimed thereon on the estimated value of the claim." (R. 7.)

[2] Sec. V provides: "The Company shall file with the Reinsurer a specimen copy of each policy form issued by the Company and reinsured hereunder and the Company shall furnish amendments thereto as and when changes are made." (R. 7.)

tendent of insurance for the state of Missouri (R. 33, 38). This was the first time that any action was taken against respondent, although it had previously been threatened with suit (R. 12, 14).

Neither Cooper-Jarrett nor Central have ever paid out anything upon the claim of petitioner and both Cooper-Jarrett and Central have been discharged from all liability by the orders of the Federal District Court for the Western District of Missouri and the Circuit Court of Cook County, Illinois. Neither Cooper-Jarrett nor Central have ever defended the suit brought by petitioner and the judgments upon which petitioner is proceeding against respondent in the Missouri state court have been default judgments rendered without any trial on the merits.

SUMMARY OF ARGUMENT.

I.

The bill of complaint showed the existence of an actual, justiciable controversy between the parties. Respondent was not a party, and never had been a party, to any pending state court action of petitioner's when its declaratory judgment suit was filed. Therefore, the Appellate Court's reversal of the District Court's final order of dismissal was proper.

II.

There was no pending state court action to which respondent was a party when the bill for declaratory relief was filed, and thereore, if the bill stated an actual, justiciable controversy it was an abuse of the trial court's discretion to dismiss it. Furthermore, since respondent was not a party to any pending state court action, the declaratory judgment suit was not tantamount to the removal of a non-removable cause.

III.

There is no conflict between the decision of the Tenth Circuit in this case and the decisions of the other Circuit Courts of Appeal.

ARGUMENT.

I.

A proper case for declaratory relief was stated in the bill of complaint.

The learned Circuit Court of Appeals for the Tenth Circuit held that the District Court had exceeded its discretionary power in dismissing respondent's bill of complaint. It therefore reversed the District Court's judgment and remanded the cause.

The propriety of the Circuit Court of Appeals' decision is manifest from the decisions of this court and the various Circuit Courts of Appeal. The facts in this case clearly establish that when respondent filed its suit for declaratory relief there was no action of petitioner's pending to which respondent was a party. The garnishment proceeding at that time was against Central, and it was based on a default judgment obtained against Cooper-Jarrett after both Cooper-Jarrett and Central had been discharged from all liability to petitioner. Central's liability, if any, arose from its contract with Cooper-Jarrett. Respondent's liability, if liability there was, arose from its separate contract with Central. Respondent's rights and liabilities as a reinsurer of Central's risks could not have been determined in the only garnishment proceeding pending when its bill for declaratory relief was filed, because that proceeding was against Central alone. Respondent was neither a proper nor a necessary party to that case and could not be made a party.

Prior to respondent's instituting this action for a declaratory judgment it had been threatened with suit, and an actual justiciable controversy existed between it and

petitioner. Under such circumstances, respondent chose to avail itself of the remedy given to it by the Federal Declaratory Judgment Act rather than to await the whim or caprice of petitioner to have its possible liability adjudicated.

It has been held consistently that under similar circumstances a party is entitled to declaratory relief, and that the trial court has no discretion to deny the remedy granted by the Declaratory Judgment Act. *Ohio Casualty Company* v. *Gordon*, 95 F. (2d) 605 (C. C. A. 10, 1938); *Employers Liability Assur. Corp., Ltd.*, v. *Ryan*, 109 F. (2d) 690 (C. C. A. 6, 1940), *cert. granted*, 310 U. S. 621, 84 L. Ed. 1394, *dismissed*, 311 U. S. 722, 85 L. Ed. 45; *Western Cas. & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. (2d) 514 (C. C. A. 3, 1938); *United States Fid. & G. Co.* v. *Koch*, 102 F. (2d) 288 (C. C. A. 3, 1939); *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824 (C. C. A. 8, 1940); and *Lehigh Coal & Navigation Co.* v. *Central Railway of N. J.*, 33 F. Supp. 362 (D. Ct. Pa. 1940).

The existence of another adequate remedy is no reason for a court to refuse to grant relief by way of a declaration of rights. Rule 57, Rules of Civil Procedure (28 U. S. C. A. following Section 723c). In the *Lehigh Coal* case, *supra*, Kalodner, J., said (page 366):

> "As was stated in *Employers' Liability Assur. Corp., Limited*, v. *Ryan et al., supra*, Rule 57 has crystallized the prevailing view that the Declaratory Judgment Act furnishes an additional remedy which is not to be denied the plaintiff because of the pendency of another suit."

Where the state court action will not determine all the issues included in the declaratory judgment suit, it has

been held that the pendency of such an action in a state court will not justify a denial of declaratory relief. In *Maryland Casualty Co.* v. *United Corp.*, 111 F. (2d) 443 (C. C. A. 1, 1940), the Circuit Court of Appeals reversed the District Court's dismissal of a bill for a declaratory judgment where there was a pending state action because:

> "* * * in the case at bar the pending suit in the state court will determine only the liability of the Assured for negligence; it will not determine whether the insurer had any obligation to defend or whether the insurer is obligated to indemnify the Assured. Under such circumstances it has been held, we think rightly, that the application of an insurer for a declaratory judgment cannot be denied as a matter of discretion. *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514, 515, 516."

Moreover, it has been held that declaratory relief may not be denied upon the grounds that some other action in the future may dispose of the issues involved in the declaratory judgment suit. *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824, 828 (C. C. A. 8, 1940). See also *Columbian Nat. Life Ins. Co.* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8, 1937); *Western Casualty & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8, 1939); and *Carpenter* v. *Edmonson*, 92 F. (2d) 895 (C. C. A. 5, 1937).

This court, in *Maryland Casualty Co.* v. *Pacific Oil & Coal Co.*, 312 U. S. 270, 85 L. Ed. 455 (1940), has decided by necessary implication at least, that the pendency of a state court action and the possibility that the judgment therein will be followed by supplemental process in the nature of garnishment against one requesting a declaratory judgment does not warrant the dismissal of the declaratory judgment action.

These authorities establish beyond peradventure of doubt that respondent in this case is entitled to relief by way of declaratory judgment. The mere fact that petitioner, at the time respondent filed its bill, may have intended at some indefinite time in the future, to have instituted garnishment proceedings against respondent cannot defeat respondent's right to a declaration. To so hold would absolutely nullify the express intention of Congress to give a potential litigant the right to have his liability determined without having to await coercive action by his adversary.

II.

Respondent's declaratory judgment suit is not tantamount to the removal of a non-removable action.

Petitioner has gone to great length in his brief to develop the theory that under Missouri law garnishment is a supplemental process in aid of execution. From this premise, petitioner reaches the amazing conclusion that since there was an unsatisfied judgment against Cooper-Jarrett and a garnishment proceeding upon that judgment against Central, a suit involving the same issues as those in respondent's declaratory judgment action was pending against respondent at the time it filed suit in the District Court. Petitioner reaches this anomalous result despite his admission that at the time the declaratory judgment action was commenced no proceeding or process had been instituted or issued against respondent (R. 14, 21).

Petitioner's argument is both specious and misleading. Whether the Missouri garnishment statute gives petitioner a supplemental remedy which is a continuation of the original suit against Cooper-Jarrett or whether it is a

separate and independent action is a bootless distinction. It is an attempt to deny respondent the right to declaratory relief through the creation of a fictional difference.

It is recognized that declaratory relief is equitable in nature and derived in part from *quia timet* relief. An ancient maxim of equity jurisprudence holds that *equity regards the substance and intent rather than the form.* Bearing in mind this maxim, an analysis of petitioner's argument shows its fallacy. Garnishment, whether considered to be a supplemental or an independent action, is based on the same fundamental principle—that a judgment creditor may reach credits of his judgment debtor. Regardless of which label the procedure bears, the issue in each type is the same, namely, does the defendant in garnishment owe the judgment debtor anything? Under the Missouri practice, the garnishment proceeding is instituted by a summons issued to the garnishee. Not until that is done is the garnishee subject to the jurisdiction of the court. By no stretch of the imagination can it be said that a suit was pending against respondent prior to the time it was served with summons of garnishment. The record shows (R. 20) that this was not done until after the institution of this declaratory judgment action. Judgment against Central, which is the *sine qua non* of garnishment of respondent, was not obtained until June 28, 1940 (R. 38).

Homan v. *Employers Reinsurance Corp.*, 345 Mo. 65, 136 S. W. (2d) 289 (1939), is not authority for the proposition advanced on page 28 of petitioner's brief that garnishment of respondent is not dependent upon a judgment against Central. In the *Homan case* the Missouri court considered a contract entirely different from respondent's contract with Central. The contract before the Supreme Court of Ohio in *Sticket* v. *Excess Ins. Co.*

f America, 136 Ohio St. 49, 23 N. E. (2d) 839 (1939), is he same contract between Excess and Central that is involved in this case. And on motion for rehearing the lissouri court was careful to distinguish this Excess-entral contract from the contract before it in the *Homan ase*. It said (page 302) that

> "* * * We think the contract under consideration there (Stickel case) is easily distinguishable from the one here. The court followed the case of *Fidelity and Deposit Company* v. *Pink*, 302 U. S. 224, 58 Sup. Ct. 162, 82 L. Ed. 213, as the most applicable case and thereafter said, 'It would be superfluous to cite additional authorities, for, after all, the decisions turn largely upon the language of the particular contract under examination in the particular occasion.'"

The authorities discussed in Point I of this brief, and particularly the *Pacific Oil & Gas*, *Gordon*, and *Ryan* cases, clearly establish that petitioner's assertion that the opinion below permits the removal of a non-removable cause is without merit.

III.

There is no conflict between the decisions of the various circuits.

Petitioner contends that the opinion of the Circuit Court of Appeals in this case conflicts with the opinions in *Aetna Gas. & Ins. Co.* v. *Quarles*, 92 F. (2d) 321 (C. C. A. 4, 1937); *American Automobile Ins. Co.* v. *Freundt*, 103 F. (2d) 613 (C. C. A. 7, 1939); *Thompson* v. *Moore*, 102 F. (2d) 372 (C. C. A. 8, 1940); and *State Farm Mutual Ins. Co.* v. *Hugee*, 115 F. (2d) 298 (C. C. A. 4, 1940).

The *Quarles case* was one of the earlier decisions dealing with the Federal Declaratory Judgment Act. While some cases have followed it, nevertheless the rule it announced is recognized to have been superseded by Rule 57, Rules of Civil Procedure and subsequent courts of appeals decisions. In *Employers Liability Assur. Corp., Ltd.* v. *Ryan*, 102 F. (2d) 690 (C. C. A. 6, 1940), *cert. granted*, 310 U. S. 261, 84 L. Ed. 1394, *dismissed*, 311 U. S. 722, 85 L. Ed. 45, the court was urged to follow the decision in the *Quarles case*. In refusing to do so, it said:

> "'The Quarles case was one of the early decisions interpretative of the Declaratory Judgment Act. It was thought by the court therein that the remedy should not be invoked merely to try issues or determine the validity of defenses in pending cases. The presently prevailing view seems to be that the Declaratory Judgment Act furnishes an additional remedy which is not to be denied the plaintiff because of the pendency of another suit, a concept which, as noted by us in *E. W. Bliss Co.* v. *Cold Metal Process Co.*, 6 Cir., 102 F. (2d) 105, has been crystalized by the Rules of Civil Procedure for the District Courts of the United States, in Rule 57, 28 U. S. C. A. following Section 723c, which provides 'The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.'"

In addition, the *Quarles case* can be distinguished upon the facts. There the original bill was amended to show that judgment had been obtained and supplemental proceedings instituted upon that judgment in the state court. The declaratory judgment was sought on the bill as amended. Here, on the other hand, no garnishment was issued against respondent and it was never a party to petitioner's state court action until almost two months

ter the bill was filed in the district court. Respondent's etition was never amended and petitioner's motion to smiss was filed before he had obtained judgment against entral (R. 5, 30).

The *Freundt case* is not applicable because there the urt held that under Illinois law the garnishment proeding afforded the opportunity to determine the exact sue raised in the Declaratory Judgment Act. This is t true in the instant case. The only question properly fore the Missouri Court in the garnishment proceedg is whether or not respondent owes Central, the judgent debtor. Under the Missouri law and decisions spondent can not maintain what amounts to a collateral ttack upon petitioner's judgments against Cooper-Jarrett nd Central upon which the garnishment is founded. Only the record shows on its face that those judgments are oid can respondent successfully attack them. *Potter* v. *Whitten*, 161 Mo. App. 118, 142 S. W. 453 (1912); *Nevatt* v. *Springfield Normal School*, 79 Mo. App. 198 (1899); *Wise* v. *Loring*, 54 Mo. App. 258 (1893); and *Godman* v. *Gordon*, 61 Mo. App. 685 (1895). Consequently, to deny espondent the right to a declaratory judgment will also eny respondent the right to question the regularity and alidity of the judgments against Cooper-Jarrett and entral.

The *Moore case* is not pertinent for there the Federal urt did not have jurisdiction because of the absence of he required diversity of citizenship. And the same criticism and distinction applies to *State Farm Mutual Automobile Co.* v. *Hugee*, which is relied upon by petitioner.

Conclusion.

The authorities clearly establish that respondent is entitled to relief by way of a declaratory judgment, and that the Circuit Court of Appeals for the Tenth Circuit properly reversed the District Court's order of dismissal.

It is urged, therefore, that the petition for certiorari be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 772

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

v.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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v.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The final order of the District Court (R. 39, 40) is unreported. The opinion of the Circuit Court of Appeals (R. 41-45) is reported in 121 F. (2d) 776. Petition for certiorari was filed November 27, 1941, and granted January 5, 1942. ——— U. S. ———, 86 L. ed. 362.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 23, 1941 (R. 45, 46). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Petitioner only partially states the facts. Respondent, therefore, feels that a short, chronological statement of all the facts is necessary to a proper discussion and understanding of the issues.

Respondent is a New York insurance company, engaged in the business of reinsuring direct-writing insurers. In the year 1932 respondent entered into a contract with Central Mutual Insurance Company of Chicago, Illinois (a direct-writing insurance company), by the terms of which respondent agreed to repay any amount of ultimate net loss which Central might pay, over and above certain specified amounts, by reason of losses under public liability policies issued by Central during the life of the reinsuring agreement (R. 4, 5, 6).

This contract was signed by Central in Chicago, Illinois, and by respondent in New York City (R. 6).

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(1) The reinsuring clause of the contract provides: "Section I. The Reinsurer agrees to reinsure the Company (Central) as respects all third party automobile public liability policies, * * * and agrees to repay any amounts of ultimate net loss which the Company may pay in excess of the first Five Thousand Dollars ($5000) on account of any one person injured or killed and the first Ten Thousand Dollars ($10,000) on account of more than one person injured or killed in any one accident, * * *." "Section II. The term 'ultimate net loss' shall be understood to mean and shall mean the sum actually paid in cash in settlement of losses for which the Company is liable. * * *." (R. 5).

In January of 1934 Central issued a policy of public liability insurance to Cooper-Jarrett, Inc., a motor freight carrier operating out of Kansas City, Missouri (R. 6, 7). By this policy Central agreed to insure Cooper-Jarrett against loss from liability imposed by law for damages on account of bodily injury, including death, occasioned by the ownership, operation or maintenance of certain motor vehicles described in the policy (R. 7).

In October, 1934, petitioner's decedent was killed in an accident that occurred in the state of Ohio while he was operating a truck leased by Cooper-Jarrett (R. 7). Immediately after the accident petitioner filed a damage suit against Cooper-Jarrett in the Circuit Court of Jackson County, Missouri, at Independence (R. 7, 8). Central was tendered the defense of the suit, but refused to do so upon the ground that its policy did not cover the accident and the injury sustained (R. 8). Cooper-Jarrett then employed counsel who filed an answer traversing the allegations of the petition (R. 8).

On January 11, 1937, Central was found to be hopelessly insolvent and the Circuit Court of Cook County, Illinois, in a statutory liquidation proceeding, entered an order directing the liquidation of the company and appointing Henry G. Miller, Esq., permanent receiver of all Central's assets (R. 8). Within a few days the Illinois Court made an order restraining and enjoining all persons from bringing, prosecuting or maintaining any action against Central except in that Court (R. 8). By another order it directed all claimants to present their claims to that Court within a day stated or be forever barred (R. 8). Notices of the above order and proceedings were sent by the receiver to all known claimants and policyholders including petitioner (R. 8). Petitioner never filed any claim with the receiver, and

there is no longer any liability on the part of Central or its receiver (R. 8-9).

Subsequent to Central's receivership and on May 14, 1937, Cooper-Jarrett, Inc., filed in the Federal District Court for the Western District of Missouri its petition for reorganization under the provisions of Section 77B of the Federal Bankruptcy Act (R. 9). Petitioner filed his claim in that proceeding, but on April 1, 1939, the Bankruptcy Court, upon *ex parte* application, permitted petitioner to withdraw his claim and prosecute his action in the Missouri state court on the ground that Cooper-Jarrett had insurance (R. 9). On the same day the final decree in the 77B proceeding was entered and it, *inter alia*, fully and finally discharged Cooper-Jarrett from any claim or judgment that had been obtained or might be obtained by petitioner (R. 9).

On April 22, 1939, a default judgment for $20,000 was entered by the Circuit Court of Jackson County, Missouri, against Cooper-Jarrett and in favor of petitioner (R. 7-8). Almost two years before (September 30, 1937) the attorneys employed by Cooper-Jarrett had withdrawn and thereafter and at the time the default judgment was rendered Cooper-Jarrett was without counsel and no defense was offered (R. 9).

Following the default judgment, petitioner attempted to serve (contrary to the existing orders of the Circuit Court of Cook County, Illinois) summons in garnishment upon Central by delivering copies thereof to the superintendent of insurance for the state of Missouri (R. 9). *After* the present suit was filed, and on June 28, 1940, final judgment for $22,100 (more than twice the limit of the policy), was entered by default against Central in the garnishment proceeding (R. 36).

April 10, 1940, respondent filed its bill of complaint for declaratory and equitable relief in the United States

District Court for the District of Kansas (R. 3). Original Federal jurisdiction affirmatively appeared, the complaint alleging diversity of citizenship and that the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000 (R. 4, 5). At that time respondent was not and never had been a party to any of the proceedings in the Missouri state court. Moreover, respondent had never been notified by Central either of the Ohio accident or of the claim and suit filed by petitioner against Cooper-Jarrett (R. 12). This Central was obligated to do by the terms of the contract of reinsurance between it and respondent.[1] Central had also failed to notify respondent of the issuance of its policy to Cooper-Jarrett, Inc., and had never filed a specimen copy thereof with respondent as it was required to do by Section V of the contract.[2] The first knowledge respondent ever had of petitioner's suit against Cooper-Jarreft was on February 9, 1939, when it received a letter from Frank T. Barker, Esq., the attorney for Cooper-Jarrett in the reorganization proceeding (R. 12).

After respondent filed this action for declaratory relief, and on May 29, 1940, the petitioner had summons in garnishment against respondent served on the superintendent of insurance for the state of Missouri (R. 31, 36). This was the first time that any action was taken against respondent, although it had previously been threatened with suit (R. 10, 13).

June 27, 1940, petitioner filed his motion to dismiss and answer (R. 3). On July 1, 1940, the motion was

(1) Sec. IX: "The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. * * *." (R. 6).

(2) Sec. V provides: "The Company shall file with the Reinsurer a specimen copy of each policy form issued by the Company and reinsured hereunder and the Company shall furnish amendments thereto as and when changes are made." (R. 6).

argued to the Court, at the conclusion of which the Court indicated it would dismiss the complaint. The Court said (R. 39):

> "The Court: As I understand, the merits of the case with reference to the death of this decedent have never been tried.
>
> "Mr. Woods: That is correct, and it is almost six years now.
>
> "The Court: Well, I don't think this Court will interfere with that. This case will be dismissed.
>
> "You may draw a journal showing that after this long lapse of time, after your litigation in Missouri, that this Court feels in its discretion that it ought not to interfere with that litigation in any way."

The order of dismissal reads (R. 39):

> " . . . the Court having duly considered said bill of complaint and said motion to dismiss having heard and considered the statements of fact and arguments of counsel, and the length of time which has transpired since the inception of the Missouri suit referred to in plaintiff's complaint, and being fully advised in the premises, finds that in the exercise of the Court's sound discretion defendant's motion to dismiss plaintiff's bill should be sustained, and the case be not heard upon the merits by this Court."

Neither Cooper-Jarrett nor Central has ever paid out anything upon the claim of petitioner and both Cooper-Jarrett and Central have been discharged from all liability by the orders of the Federal District Court for the Western District of Missouri and the Circuit Court of Cook County, Illinois. Neither Cooper-Jarrett nor Central defended the suit brought by petitioner and the judgments upon which petitioner is proceeding

against respondent in the Missouri state court have been default judgments entered without any trial on the merits.

QUESTIONS PRESENTED.

1. Did the District Court have a discretion to decline to pass on respondent's prayer for a declaratory judgment? If it did, was its discretion properly exercised, or exceeded?

2. Did the District Court have any discretion to dismiss that part of respondent's complaint which invoked the independent, equitable jurisdiction of that Court?

ARGUMENT.

I.

A present, actual, justiciable controversy was stated.

The Federal Declaratory Judgment Act (Sec. 274d, Judicial Code; 28 U. S. C. A. §400) confers jurisdiction upon the Federal Courts to grant declaratory relief where (1) the requisite diversity of citizenship exists and the statutory amount is involved, and (2) a justiciable, as distinguished from an academic, moot or advisory, question is presented. Where the controversy is real and a "case and controversy" is made within the meaning of the Constitution and an "actual controversy" appears within the meaning of the Act, the power and jurisdiction to grant declaratory relief are clear. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 81 L. ed. 617, 108 A. L. R. 1000 (1937); *Columbian Natl. Life Ins. Co.* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8, 1937); *U. S. F. & G. Co.* v. *Pierson*, 97 F. (2d) 560 (C. C. A. 8, 1938); *Associated Indemnity Corp.* v. *Manning*, 92 F. (2d) 168 (C. C. A. 9, 1937).

In this case respondent is seeking to have its liability or non-liability under the contract with Central determined. Before the commencement of this suit petitioner was maintaining and now maintains that respondent is liable to him because of the Central-Excess contract. Respondent, on the other hand, has at all times denied liability.[1] This situation and the antagonistic positions of the parties clearly presented an actual controversy within the definition of the *Haworth* case, and the subsequent cases so holding are legion. Petitioner admits the existence of such a controversy. (¶12 (b) R. 10-11; admitted R. 19).

II.

A proper case for declaratory relief was stated in the complaint.

It is freely conceded that trial courts have a discretion to refuse declaratory relief under certain circumstances. But that discretion is limited. The only cases where it has been upheld are where there was already pending in another court a suit between the same parties, involving the same or substantially the same issues, and where there was no doubt but that plaintiff could obtain as full, adequate and complete relief in the pending state court action. *Western Supply Co.* v. *Freeman*, 109 F. (2d) 693 (C. C. A. 6, 1940). To this it may be added that the discretion exists also where the declaratory suit merely seeks to anticipate a defense which is or may be raised in the pending action. *Aetna Cas. & Surety Co.*

1. The Central-Excess contract has many times been construed to be one of indemnity against loss, with no obligation on Excess to do more than reimburse the primary insurer for actual payments made. *Stickel* v. *Excess Ins. Co. of America*, 136 O. St. 49, 23 N. E. (2d) 839 (1939); *Fisher* v. *Excess Ins. Co.*, 115 F. (2d) 755 (C. C. A. 8, 1940); *Excess Ins. Co. of America* v. *Josh Owen*, (D. C. Okla., Oct. 16, 1939 [not officially reported]). *Cf. Fid. & Dep. Co.* v. *Pink*, 302 U. S. 324, 82 L. ed. 213 (1938). Petitioner doubtless relies on *Homan* v. *Employers Reins. Corp.*, 345 Mo. 650, 136 S. W. (2d) 289 (1939), but the court there was careful to distinguish the contract there involved from that in the instant case. See 345 Mo. 650, l. c. 670, 671, 136 S. W. (2d) 289, 302.

v. *Quarles*, 92 F. (2d) 321 (C. C. A. 4, 1937); Borchard, *Declaratory Judgments* (2 Ed. 1941), p. 653.

But under all the authorities, if there is no pending suit between the same parties, or if there is, and it is not entirely clear that the relief which can be obtained in the other suit is fully adequate and complete, the trial court exceeds its discretion in declining to entertain the suit. *Associated Indemnity Corporation* v. *Garrow Co.*, 125 Fed. (2d) 462, (C. C. A. 2, 1942);[1] *Ohio Casualty Co.* v. *Gordon*, 95 F. (2d) 605 (C. C. A. 10, 1938); *Western Cas. & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. (2d) 514 (C. C. A. 3, 1938); *United States Fid. & G. Co.* v. *Koch*, 102 F. (2d) 288 (C. C. A. 3, 1939); *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824 (C. C. A. 8, 1940); *Aetna Cas. & Surety Co.* v. *Yeatts*, 99 F. (2d) 665 (C. C. A. 4, 1938); *Employers' Liability Assur. Corp., Ltd.* v. *Ryan*, 109 F. (2d) 690 (C. C. A. 6, 1940), *cert. granted*, 310 U. S. 621, 84 L. ed. 1394, *dismissed*, 311 U. S. 722, 85 L. ed. 470; *Lehigh Coal & Navigation Co.* v. *Central Railway of N. J.*, 33 F. Supp. 362 (D. C. Pa., 1940); and Borchard, *Declaratory Judgments* (2d Ed., 1941), pp. 313, 314, 654, 659; *Standard Acc. Ins. Co.* v. *Meadows*, 125 Fed. (2d) 422, (C. C. A. 5, 1942).

The existence of another adequate remedy is no reason for a Court to refuse to grant relief by way of a declaration of rights. Borchard, *Declaratory Judgments* (2d Ed., 1941), p. 313; Rule 57, Rules of Civil Procedure (28 U. S. C. A. following § 723c). In the *Lehigh Coal* case (*supra*) Kalodner, J., said (p. 366):

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1. In a per curiam opinion, the Second Circuit, citing with approval the opinion below, in the instant case, said:

"It would have been an abuse of discretion not to decide it in the declaratory judgment suit. *Excess Ins. Co. of America* v. *Brillhart*, 10 Cir., 121 F. (2d) 776."

"As was stated in *Employers' Liability Assur. Corp., Limited* v. *Ryan, et al., supra, Rule* 57 has crystallized the prevailing view that the Declaratory Judgment Act furnishes an additional remedy which is not to be denied the plaintiff because of the pendency of another suit."

Where the state court action will not determine all the issues included in the declaratory judgment suit, it has been held that the pendency of such an action in a state court will not justify a denial of declaratory relief. In *Maryland Casualty Co.* v. *United Corp.*, 111 F. (2d) 443 (C. C. A. 1, 1940), the Circuit Court of Appeals reversed the District Court's dismissal of a bill for a declaratory judgment where there was a pending state action because:

"* * * in the case at bar the pending suit in the state court will determine only the liability of the Assured for negligence; it will not determine whether the insurer had any obligation to defend or whether the insurer is obligated to indemnify the Assured. Under such circumstances it has been held, we think rightly, that the application of an insurer for a declaratory judgment cannot be denied as a matter of discretion. *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 3 Cir., 101 F. (2d) 514, 515, 516."

Moreover, it has been held that declaratory relief may not be denied upon the grounds that some other action in the future may dispose of the issues involved in the declaratory judgment suit. *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824, 828 (C. C. A. 8, 1940). See also *Columbian Nat. Life Ins. Co.* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8, 1937); *Western Casualty & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8, 1939); *Carpenter* v. *Edmonson*, 92 F. (2d) 895 (C. C. A.

5, 1937); Borchard, *Declaratory Judgments* (2d Ed., 1941) p. 653.

This Court, in *Maryland Casualty Co.* v. *Pacific Oil & Coal Co.*, 312 U. S. 270, 85 L. ed. 826 (1941), has decided, by inevitable implication, that the pendency of a state court action against another and the possibility that the judgment therein will be followed by supplemental process in the nature of garnishment against one requesting a declaratory judgment does not warrant the dismissal of the declaratory judgment action.[1]

Moreover, this case and *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, both hold that where a justiciable controversy is pleaded and the requisite diversity of citizenship and jurisdictional amount are present, that the plaintiff in a declaratory judgment suit is entitled to the relief prayed if the pleaded facts are proved. And in so deciding, both cases necessarily assume that the Federal Courts ordinarily have no discretion to decline jurisdiction. From which it should follow, that in declaratory judgment suits, as in all others where Federal jurisdiction exists, the court must exercise its powers unless other facts are shown which would relax the imperative duty into a discretion to decline. The circumstances which may give rise to such a discretion have already been shown. But the instant case is not among them.

Here there was no pending suit between the parties. If there had been, the issues would not have been the same, and the remedies and relief here sought could never have been accorded in the garnishment proceeding in the state court.

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1. It is interesting to note, petitioner's contention to the contrary notwithstanding, that the proceeding in Ohio, as in Missouri is a supplementary process and not an independent action. Page's Ohio General Code, Sec. 9510-3, 9510-4. *Cf.* Rev. Stat. Mo. 1939, Secs. 6009, 6010. (See Appendix).

Petitioner's oft-repeated assertion and assumption of the existence of a pending state court action between the same parties is the very reverse of the fact. This suit, not the state court proceeding, was the first brought, and petitioner is really pressing upon the court the proposition that the Federal Court should give way to the later garnishment proceeding in the state court. The Federal suit between these parties was filed April 10, 1940. The garnishment proceeding by petitioner against respondent was instituted May 29, 1940. And if there is any reason why one of them should end, it should be the garnishment proceeding and not this suit. In truth, since both proceedings are transitory in character, both may pend at the same time under ordinary usage and custom of the courts. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. ed. 227 (1922). Nor will the fact be overlooked that the pendency or prosecution of this suit will not interfere with the garnishment proceeding in the state court.

The mere fact that petitioner, at the time respondent filed its bill, may have intended or even threatened to institute garnishment proceedings against respondent cannot defeat respondent's right to a declaration. So to hold would nullify the purpose of the Act which is to give a potention litigant the right to have his liability determined without having to await coercive action by his adversary. The effect of such a holding would be to deny to an insurance company in the position of respondent here the right to a declaratory judgment in every case where an injured person institutes suit against an insured. Once such a suit is filed, the insurance company would be precluded from asking for declaratory relief, because the suit might possibly eventuate in action against the insurance company by way of garnishment or similar proceeding. Obviously, Congress did not intend so to limit the remedy.

III.

Respondent's relief in a Missouri garnishment proceeding is not as full, adequate, and complete as that obtainable in the declaratory judgment action.

It is true that in Missouri a garnishment proceeding on execution is a mere continuation of the old, and not the institution of a new suit. But except as applied to the parties themselves, this is the statement of a mere legal fiction. When a garnishee is brought in by the service of a summons he becomes a party to that suit for the first time. By no stretch of the imagination can it be said that there is a suit pending against him before he is actually served with process. And as between the judgment creditor and the garnishee, no matter by what name it is called, the proceeding is a new suit, a new action. It is begun by the issuance and service of a summons. The issues are then framed by pleadings filed by the garnishee and the judgment creditor. The issues thus formed are tried by the Court and by a jury if necessary. The trial results in a final judgment, either in favor of or against the garnishee, and that judgment is enforced by execution in the same manner as is the judgment against the defendant in the original suit. In other words, garnishment in Missouri possesses all the attributes of a conventional suit at law. It is idle to say that the issues between plaintiff and defendant in the lawsuit are the same as those between a judgment creditor and a garnishee.

Respondent here was brought into the state court proceeding after its complaint for declaratory relief was filed (R. 3, 31, 36, 37). And so there was no suit pending against the respondent on April 10, 1940.

Commencing with the premise that garnishment in Missouri is a supplemental process in aid of execution,

petitioner reaches the amazing conclusion that since there was an unsatisfied judgment against Cooper-Jarrett and a garnishment proceeding upon that judgment against Central, a suit involving the same issues as those in respondent's declaratory judgment action was pending against respondent at the time it filed its complaint in the District Court. Petitioner reaches this anomalous result despite the undisputed fact that at that time no proceeding or process had been instituted or issued against respondent.

Petitioner's argument creates a distinction out of an immaterial difference. Whether the Missouri garnishment statute gives petitioner a supplemental remedy which is a continuation of the original suit against Cooper-Jarrett or whether it is a separate and independent action is a bootless distinction.

If the garnishment proceeding had pended, the issues would not have been the same as those here. The relief, if any, which Excess could get in the garnishment proceeding would be wholly inadequate. In Missouri a garnishment proceeding is purely legal. The only defense available in such a proceeding would be that it did not owe the primary insurer, Central, or Cooper-Jarrett, the assured. Neither the judgment against Cooper-Jarrett nor against Central could be challenged upon any ground except that it was *coram non judice* and void, and then only if the defect appeared on the face of the record. The law of Missouri is settled on this point.

In *Potter* v. *Whitten*, 161 Mo. App. 118, 142 S. W. 453 (1912), which was a garnishment proceeding, the Court said (131-2):

" • • • It was early held that objections to a judgment rendered against defendant, which

do not go to the jurisdiction of the Court, and concern defendant alone, cannot be successfully raised by a garnishee for defendant's indebtedness. [*The St. Louis Perpetual Ins. Co.* v. *Cohen*, 9 Mo. 421.]"

And in *Nevatt* v. *Springfield Normal School*, 79 Mo. App. 198 (1899), the garnishee urged that the proceedings as to him should be dismissed because the judgment against the original defendant had been rendered without service of process. The judgment itself, however, stated that process had been served. The Court refused to dismiss the proceeding, saying, p. 201:

"It is conceded in the abstract of the record that the foregoing judgment correctly states the service of process upon which it was rendered; hence the whole question for decision is whether or not the recitals of the judgment show the Court had no jurisdiction of the person of the defendant? For unless that appears from the face of the judgment its validity cannot be questioned when sought to be enforced by garnishment, without subjecting it to collateral attack, and this the law does not permit. *Godman* v. *Gordon*, 61 Mo. App. 685; *Wise* v. *Loring*, 54 Mo. App. 258; *Truesdail* v. *McCormick*, 126 Mo., loc. cit. 45. If the judgment under which the garnishee is summoned is void, he is entitled to a discharge. If it is merely voidable, he is not for that reason entitled to a discharge. *Hopkins* v. *Huss*, 67 Mo. App. 394, 61 Mo. App. *supra*. This is so because he occupies the status of a stranger to the judgment against his creditor, and hence can only urge against it the objections available on collateral attack."

So also, in *Reid, Murdock & Co.* v. *Mercurio*, 91 Mo. App. 673 (St. Louis St. of App., 1902), the Court said (p. 678):

"Appellant (garnishee) can not be heard to say the judgment of the justice of the peace in the original action is void on the ground that the ac-

count filed by the plaintiff was insufficient. Jurisdiction was obtained over one of the Mercurios, as the return of the constable shows; and if the defendant who was served did not contest the sufficiency of the account or statement, certainly the judgment can not be attacked on account of its indefiniteness, in this collateral proceeding by a third party. *Myers* v. *McRay*, 114 Mo. 377."

In the case at bar the record of the Missouri state court shows no lack of jurisdiction as to either Cooper-Jarrett, Inc., or Central. Respondent, consequently, would be precluded by the rule announced in the *Nevatt*, *Reid-Murdock* and *Potter* cases from raising that defense. This alone, shows the inadequacy of the relief afforded plaintiff in the Missouri action, and unequivocably establishes its right to declaratory relief.

IV.

The trial court had no discretion to dismiss the entire complaint since it included prayers for both declaratory and equitable relief.

Respondent's complaint seeks more than a declaration. If by its contract with Central it is beholden to Brillhart, then respondent invokes the independent equitable jurisdiction of the court to restrain Brillhart from enforcing (as to respondent) his judgments against Cooper-Jarrett and Central. The joinder of this prayer for "further relief" is authorized by the Act. Judicial Code, § 274d; 28 U. S. C. A. § 400. Moreover, with or without this authorization, since Federal jurisdiction over this part of the controversy is concededly present, the trial court had no discretion to decline (as it did, R. 39) to hear that part. It was bound to proceed to judgment. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234, 67 L. ed. 227 (1922); *Smith* v. *Apple*, 264 U. S. 274, 280, 68 L. ed. 678 (1924); *Kansas* v. *Colorado*, 185 U. S. 125, 145, 46

L. ed. 838 (1902); *New York Life Ins. Co.* v. *London*, 15 F. Supp. 586, 590, (D. Ct. Mass. 1936).

If the proposition above premised is sound, then, discretion *vel non* as to the declaration, the trial court erred in dismissing the complaint. And from this it must also follow that if the court had no right to dismiss the entire complaint, it certainly would abuse its discretion if it passed upon the coercive part of the suit and left the rest of it hanging in the air. This for two formidable reasons: (1) the prayer for injunctive relief cannot be passed on until the prayer for a declaration is determined, and (2) courts of equity always deal out full and complete justice and not by halves.

The pleaded facts carry a powerful equitable appeal. [Paragraphs 13-17, inc., R. 11-14]. In these paragraphs it is charged (1) that the judgments against both Cooper-Jarrett, Inc., and Central were entered after each had been released from all liability to petitioner; (2) that neither the suit against Cooper-Jarrett, Inc., nor the garnishment proceeding against Central had defenders of was defended; (3) that respondent was a party to neither of these proceedings and was never accorded an opportunity to defend; and that to bind it by either judgment would be to deprive respondent of its rights without the due process of law guaranteed by Article XIV, Section 1, of the Amendments to the Federal Constitution; (4) that the entry of the default judgment against Central was also a denial of the full faith and credit accorded by Article IV, Section 1, of the Federal Constitution, to the orders, judgments and proceedings of the Circuit Court of Cook County, Illinois; (5) that under the real facts Cooper-Jarrett was not liable to Brillhart; that even if liability existed, the amount of the recovery was far in excess of the actual loss or damage sustained; (6) that Brillhart's

decedent was an employee of Cooper-Jarrett at the time, and his remedy limited to that accorded by the Workmen's Compensation Law of Ohio or Missouri, and that the accidental death was not within the coverage of Central's primary policy; and (7) finally, it appears that Brillhart's default judgment against Central, entered years after it was legally dissolved and dead, and entered also after this suit was filed (R. 36), was for $22,000, which was $12,000 in excess of Central's policy limit (R. 7, 36). Respondent's reinsurance with Central began at $5,000 and stopped at $145,000 (R. 5).

While § 265 of the Judicial Code prevents a Federal court of equity from enjoining proceedings in pending state court suits, nevertheless, when the litigation has ended and a final judgment has been obtained, the judgment creditor may and will be debarred from enforcing his judgment if it was obtained by fraud, without due process of law or under circumstances which would render its enforcement inequitable, unconscionable or unjust. *Wells-Fargo & Co.* v. *Taylor*, 254 U. S. 175, 65 L. ed. 205 (1920); *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 59 L. ed. 492 (1915); *Marshall* v. *Holmes*, 141 U. S. 597, 35 L.ed. 870 (1891); *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524 (1876); *Barrow* v. *Hunton*, 99 U. S. 80, 25 L. ed. 407 (1879); *Arrowsmith* v. *Gleason*, 129 U. S. 86, 32 L. ed. 630 (1889); *Johnson* v. *Waters*, 111 U. S. 640, 28 L. ed. 547 (1884).

In such action the court does not assail the judgment itself. But it lays hold of the successful party and deprives him of any inequitable advantage which he may derive from it. And the suit invokes the purely equitable power and jurisdiction of the court, is deemed to be a direct, not a collateral attack, and an original independent proceeding, a new case, arising upon new facts. [Authorities, last paragraph, supra].

Such a suit may always be maintained in a Federal equity court if by custom, law or statutory provision such a suit can be maintained in the local state court. *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524 (1876); *Barrow* v. *Hunton*, 99 U. S. 80, 25 L. ed. 407 (1879); *O'Brien* v. *Markham*, 17 F. Supp. 633, 637, (D. Ct. Cal. 1936). That Missouri courts of equity would entertain such a suit and grant the relief herein sought is settled law in that state. In *Overton* v. *Overton*, 327 Mo. 530, 37 S. W. (2d) 565 (1931), where such relief was granted, the court said (540):

> "It is settled doctrine that courts of equity have jurisdiction to grant relief against the enforcement of judgments at law where such judgments were obtained or entered through fraud, accident or mistake."

Observing that equity will not grant relief for the purpose of giving a defeated party a second opportunity to be heard, the court nevertheless said:

> "'But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issues in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; *or where the defendant never had knowledge of the suit,* * * *—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.*' [*United States* v. *Throckmorton*, 98 U. S. 61, 65]." (Our emphasis).

See also *Howard* v. *Scott*, 225 Mo. 685, 125 S. W. 1158 (1910); *Wonderly* v. *The LaFayette Co.*, 150 Mo. 635, 51 S. W. 745 (1899).

The plight in which respondent found itself in the spring of 1940 made imperative the institution in some equity court of a combined action seeking declaratory and equitable relief. If it contented itself with defending Brillhart's threatened garnishment proceeding against it, it would face the dire hazard of being unable to raise the many questions addressed to the equity side of this Court. For in the garnishment proceeding the judgments against Cooper-Jarrett and Central would probably be res adjudicata. In addition, the Missouri garnishment proceeding is purely legal, and the only question which the court can determine is whether the garnishee owes the judgment defendant. If Brillhart had lived in Missouri, where these judgments were obtained, an independent suit in equity would lie under Missouri law in the Missouri court. And if *Gaines* v. *Fuentes*, *Marshall* v. *Holmes*, *Wells-Fargo & Co.* v. *Taylor*, *Johnson* v. *Waters*, *Barrow* v. *Hunton*, *Arrowsmith* v. *Gleason* are still a part of the law of the land and have not been overruled by *Toucey* v. *New York Life*, 62 S. Ct. 139, 86 L. ed. 107 (1941) (not officially reported) (and they have not: 86 L. ed. l. c. 113), then the trial court in the instant case has the same jurisdiction and power as that possessed by Missouri courts of equity to rescue the respondent from that plight.

It is not without significance that Brillhart nowhere in his petition or briefs refers to the equitable features of this lawsuit.

If it appears from the foregoing that the District Court had no power to abjure its jurisdiction over the equitable part of this action, then it must be that it had no discretion to cast out and decline to consider

the prayer for a declaratory judgment. The equitable relief was inextricably bound up with the other and entirely contingent and dependent upon a prior adjudication of the other.

Conclusion.

There could be no more fitting end to this brief than the language in the unanimous conclusion of the learned Circuit Court of Appeals:

> "At the time appellant filed its action for a declaratory judgment, no action was pending in any court in which it was a party. No proceeding had been instituted in which its liability as a reinsurer of Central's risks was an issue. The only proceeding pending in any court was the garnishment action instituted by appellees in the District Court of Jackson County, Missouri, against Central; appellant was not a party to that cause. The liability of Central, if any, arose under the contract executed by it with Cooper-Jarrett, while the liability of appellant to appellees, if any, arose under a separate agreement between it and Central. The issues in the garnishment action could not determine the liability of appellant under its reinsurance contract.
>
> * * *
>
> "The situation in which appellant found itself was squarely within the purview of the act. It was faced with a possible claim of liability on its policy of reinsurance. In fact, appellees now claim that appellant is liable to them. No claims had been asserted against it; no suit had been filed in any court seeking to hold it liable; but the contingent liability was there. It was not compelled to await the time and pleasure of appellees in instituting their action. It had a clear right to go into a federal court of competent jurisdiction, which had jurisdiction over appellees, and ask that they be compelled to come in and assert their claims.

"The trial court exceeded its discretionary powers in dismissing appellant's bill of complaint."

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX.

Revised Statutes, Missouri, 1939.

SEC. 6009. CANCELLATION OR ANNULMENT —WHEN VOID.—In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death or damage to property by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid; occasioned by said casualty. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void. (R. S. 1929, § 5898).

SEC. 6010. JUDGMENT CREDITOR MAY COLLECT INSURANCE, WHEN.—Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or

death or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in the preceding section, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment. (R. S. 1929, § 5899).

Page's Ohio General Code.

SEC. 9510-3. LIABILITY OF INSURANCE COMPANY FOR BODILY INJURY OR DEATH. § 1. In respect to every contract of insurance made between an insurance company and any person, firm or corporation by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such person, firm or corporation is responsible, whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty.

CANCELLATION OR ANNULMENT VOID. No such contract of insurance shall be cancelled or annulled by any agreement between the insurance company and the assured, after the said assured has become responsi-

ble for such loss or damage or death, and any such cancellation or annulment shall be void.

Page's Ohio General Code, 1935 Supplement.

SEC. 9510-4. INSURANCE MONEY APPLIED

Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law.

SUPREME COURT OF THE UNITED STATES.

No. 772.—October Term, 1941.

Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner,
vs.
The Excess Insurance Company of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The Excess Insurance Company of America, the respondent here, brought this suit for a declaratory judgment to determine its rights under a reinsurance agreement made in 1932 with the Central Mutual Insurance Company of Chicago, Illinois. By that contract the respondent agreed to reimburse Central, within specified limits, for any "ultimate net loss" (defined as "the sum actually paid in cash in settlement of losses") sustained by Central under automobile public liability policies thereafter to be issued. Central undertook to notify the respondent of any accident that might be covered by the reinsurance agreement. In 1934 Central issued a public liability policy to Cooper-Jarrett, Inc. Later in that year the petitioner's decedent was killed by a truck leased by Cooper-Jarrett, Inc., and suit was brought against the latter in a Missouri state court. Central refused to defend the suit, however, claiming that the policy did not cover the accident.

While the suit was pending both Central and Cooper-Jarrett, Inc., encountered financial difficulties. By order of an Illinois state court Central was liquidated and all claims against it barred. Cooper-Jarrett, Inc., filed a petition for reorganization under § 77B in the Missouri federal district court, and the final decree in that proceeding discharged it from any judgment that had been or might be obtained by the petitioner. Cooper-Jarrett, Inc., having abandoned defense of the suit, the petitioner obtained a default judgment of $20,000 against it on April 22, 1939, and subsequently instituted garnishment proceedings against Central in a Missouri state court. Being unable to recover any part of the judgment

from either Cooper-Jarrett, Inc., or Central, the petitioner on May 29, 1940, made the respondent a party to the garnishment proceeding through service on the Missouri superintendent of insurance.

But in the meantime the respondent filed this suit for a declaratory judgment in the federal District Court for Kansas. Its bill showed diversity of the parties' citizenship and the requisite jurisdictional amount. It alleged, *inter alia*, that when the bill in the federal suit was filed, the respondent was not a party to the garnishment proceeding in the state court; that, in violation of the terms of the reinsurance agreement, Central had never notified the respondent either of the accident resulting in the death of the petitioner's decedent or of the suit brought against Cooper-Jarrett, Inc.; that the respondent's only obligation under the reinsurance agreement was to indemnify Central against loss for sums actually paid in cash in settlement of losses for which Central was liable and since Central had never satisfied the claim against Cooper-Jarrett, Inc., the respondent could not be obligated in any way under the reinsurance agreement; that Cooper-Jarrett, Inc., was not liable to the petitioner for the death of his decedent; that even if it were, Central was obligated to defend the suit, and its failure to do so discharged the respondent of any liability under the reinsurance agreement; that even if it were originally liable, the discharge of Central and Cooper-Jarrett, Inc., had the effect of releasing the respondent; and that in any event the default judgment against Cooper-Jarrett, Inc., had been fraudulently obtained.

The petitioner moved to dismiss the suit, principally on the ground that the issues involved in the suit could now be decided in the garnishment proceeding pending in the Missouri state court. The District Court dismissed the bill, apparently because of a reluctance to prolong the litigation,[1] without considering whether the claims asserted by the respondent could under Missouri law be raised in the pending garnishment proceeding. The Circuit Court of

[1] It is difficult to ascertain from the record the precise grounds for the District Court's action. Some light is shed by the following colloquy which occurred at the conclusion of the argument upon the motion to dismiss the bill:

"The Court: As I understand, the merits of the case with reference to the death of this decedent have never been tried.

"Mr. Woods [counsel for the respondent]: That is correct, and it is almost six years now.

"The Court: Well, I don't think that this court will interfere with that. The case will be dismissed. You may draw a journal showing that after this long lapse of time, after your litigation in Missouri, that this court feels in its discretion that it ought not to interfere with that litigation in any way."

Appeals held that dismissal of the suit was an abuse of discretion, but instead of remitting the cause for a proper exercise of the District Court's discretion, reversed the judgment with directions that the District Court proceed to a determination on the merits. 121 F. 2d 776. In view of the important question affecting the interrelationship of the state and federal courts in the administration of the Federal Declaratory Judgments Act, 28 U. S. C. § 400, we brought the case here. 314 U. S. 606.

Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction. The petitioner's motion to dismiss the bill was addressed to the discretion of the court. *Aetna Casualty Co.* v. *Quarles*, 92 F. 2d 321; *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. 2d 514; *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613; see Note, 51 Yale L. J. 511. Compare *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422-23; *Douglas* v. *New Haven R. Co.*, 279 U. S. 377. The motion rested upon the claim that since another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated, a declaratory judgment in the federal court was unwarranted. The correctness of this claim was certainly relevant in determining whether the District Court should assume jurisdiction and proceed to determine the rights of the parties. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

We do not now attempt a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a district court's discretion. It is enough that it appears from the record before us that the District Court did not consider whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either been foreclosed by Missouri law or could adequately be tested in the garnishment proceeding pending in the Missouri state court. This was a matter for determination, certainly in the first instance, by the District Court. Nor did the Circuit Court of Appeals, in reversing the judgment of the District Court, purport to find that under controlling Missouri law the issues set up by the respondent in this suit could not be contested in the pending Missouri proceeding.[2]

Whether and under what circumstances a reinsurer can be reached through a judgment against the insured are questions of local law. Whether the judgment against Cooper-Jarrett, Inc., could serve as a basis for garnishment proceedings against the respondent was therefore a matter of Missouri law. But that issue was never tendered before the Kansas district court; that court did not profess to pass upon it, and the Circuit Court of Appeals, in reversing the decree of dismissal, shed no light upon it.

If the lower courts had found that under Missouri law the respondent's claims could not adequately be tested in the pending garnishment proceeding, or that Missouri law on the subject was doubtful, and upon the basis of such a finding had taken jurisdiction of this suit for a declaratory judgment, we would not disturb such a finding. But no such finding can be extracted from this record. And it is not for us to attempt to pronounce independently upon Missouri law. To do so would be to disregard the limitations

[2] The opinion of the Circuit Court of Appeals contains a single sentence which, if read without reference to its context, might appear to be such a finding: "The issues in the garnishment action could not determine the liability of appellant [the respondent here] under its reinsurance contract." 121 F. 2d at 778. But, as we read its opinion, the court below clearly was referring only to the garnishment action against Central *before* the respondent was joined as a party. Of course, at that time the respondent would have no opportunity to raise in the garnishment proceeding the claims which it asserted in the federal suit for a declaratory judgment. But when the petitioner's motion to dismiss the federal suit was filed, the respondent had been made a party to the garnishment proceeding. And, as its opinion shows, the Circuit Court of Appeals did not find that under Missouri law the claims raised by the respondent in the federal suit, which were governed by Missouri law and were not previously foreclosed by it, could not be adjudicated in the garnishment proceeding after the respondent had been joined as a party.

inherent in our appellate jurisdiction. It is not our function to find our way through a maze of local statutes and decisions on so technical and specialized a subject as the scope of a garnishment proceeding in a particular jurisdiction. For one thing, it is too easy to lose our way. For example, there are numerous decisions of the Supreme Court of Missouri which declare a general principle that the garnishee can assert any defenses in a garnishment proceeding that would be open in a suit brought against him by the judgment debtor. E. g., *Weil* v. *Tyler*, 38 Mo. 545, 547; *McDermott* v. *Donegan*, 44 Mo. 85, 89; *Sheedy* v. *Second National Bank*, 62 Mo. 17, 24. We do not cite these decisions to show that the respondent's claims in this case could adequately be tested in the garnishment proceeding pending in the Missouri state court. For the crux of our ruling is that we should not be called upon to make such a determination in the first instance. But these utterances of the Missouri Supreme Court do serve as a warning that scattered opinions of an intermediate appellate court of a state may convey only doubts and confusion to one inexpert in the law of that state and yet be entirely clear and consistent when placed in the mosaic of the whole law of that state. Compare Mr. Justice Brandeis dissenting in *Railroad Commission* v. *Los Angeles R. Corp.*, 280 U. S. 145, 164. We are not concerned here with the burden of proof in establishing facts as to which only the parties to a private litigation are interested. We are concerned rather with the duty of the federal courts to determine legal issues governing the proper exercise of their jurisdiction.

The cause should be remanded to the District Court in order that it may properly exercise its discretion in passing upon the petitioner's motion to dismiss this suit.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 772.—October Term, 1941.

Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner, *vs.* The Excess Insurance Company of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1942.]

Mr. Justice Douglas concurring.

If we had here only the question as to whether the issues framed by respondent in this suit could be litigated in the statutory garnishment proceeding in Missouri, I would agree with the views expressed by the Chief Justice. But there is the further, and for me the controlling, question whether, as stated by the majority, the claims raised by respondent had been "previously foreclosed" under Missouri law. It is a fair inference from this record that respondent, like Central, received notice and had an opportunity to defend the suit brought against Cooper-Jarrett, although all of the attendant circumstances do not clearly appear. Under Missouri law the general rule seems to be that notice and opportunity to defend binds the reinsurer on judgments against the reassured. See e. g. *Strong* v. *Phoenix Ins. Co.*, 62 Mo. 289; *Gantt* v. *American Central Ins. Co.*, 68 Mo. 503; *City of St. Joseph* v. *Union Ry. Co.*, 116 Mo. 636, 643; *Finkle* v. *Western Auto. Ins. Co.*, 224 Mo. App. 285, 300. By statute (6 Mo. Stat. Ann. §§ 5898, 5899) the liability of the insurance company becomes absolute when loss occurs; and judgment against the insured establishes privity between the injured party and the insurer. See *Schott* v. *Auto Ins. Underwriters*, 326 Mo. 92; *Lajoie* v. *Central West Casualty Co.*, 228 Mo. App. 701; *Taverno* v. *American Auto Ins. Co.*, 232 Mo. App. 820. The problem is whether by reason of the insurer's liability under the policy and the statute, and respondent's liability under its reinsurance contract (See. e. g. *Holman* v. *Employers Reinsurance Corp.*, 345 Mo. 650), notice and opportunity to defend the earlier

suit were sufficient (*Schott* v. *Auto Ins. Underwriters, supra*) to bind respondent as reinsurer. Respondent's charges of fraud center on the adequacy of the notice which it received and the failure of the insured and the insurer to defend. That seems to be but one phase of the question whether under Missouri law respondent was bound by the judgment in the earlier suit.

The exercise of jurisdiction under the Federal Declaratory Judgments Act is certainly not compulsory; it is discretionary. Borchard, Declaratory Judgments (2d ed.), p. 312. If it may fairly be said under Missouri law that respondent was bound by its failure or refusal to defend the earlier suit after notice, then it would clearly be an abuse of discretion for the District Court to take or at least to retain jurisdiction of the cause in case it appeared after a hearing on that issue that respondent was so bound.

SUPREME COURT OF THE UNITED STATES.

No. 772.—October Term, 1941.

Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Petitioner,
vs.
The Excess Insurance Company of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1942.]

Mr. Chief Justice Stone, dissenting.

I think the decision of the circuit court of appeals was right and should be affirmed.

Respondent, reinsurer of an automobile public liability insurance policy, has been made a party to a garnishment proceeding instituted under the Missouri statues by petitioner, who has secured a Missouri default judgment upon a liability of the insured said to be covered by the policy. By this suit brought in the federal district court for Kansas, respondent now seeks among other things to set aside the judgment, so far as it establishes liability against the insurer, as fraudulently obtained.

Respondent's bill of complaint states a cause of action which it is entitled to have adjudicated in some court. The considerations suggested by Mr. Justice Douglas are of course relevant to the merits of respondent's case, and should be tried with other issues wherever and whenever they are to be tried. As the district court below had jurisdiction—and as no other reason is advanced for declining jurisdiction—it was plainly its duty to hear and decide all the issues necessary for disposition of the case unless it was made to appear with reasonable certainty that the issues could be adjudicated in the Missouri courts. Petitioner assumed that burden by his motion in the district court for an order dismissing the suit and remitting respondent to the state courts. The data, including statements of the facts spread upon the record, which he submitted in support of the motion have now received the consideration of three courts. None of them has said, and in

the circumstances of this case no federal court could say, either with binding authority or with reasonable certainty, that respondent can litigate in the Missouri courts its asserted right to set aside petitioner's judgment for fraud. Petitioner, who is not a citizen or resident of Missouri and not subject to the jurisdiction of its courts unless he voluntarily appears in an action there, has not said, and in this Court has carefully avoided saying, that he would appear in any independent suit brought in the Missouri courts to attack the judgment.

Further, it affirmatively appears that the question whether respondent can litigate its present cause of action in the statutory garnishment proceeding in Missouri is at best not free from doubt. The Missouri garnishment statutes do not deal expressly with the nature of the issues that can be raised in a garnishment proceeding. Missouri Revised Statutes, 1939, §§ 1560-1589. But the Missouri intermediate appellate courts seem to agree that in such a proceeding the garnishee cannot challenge the validity and effectiveness of the judgment save for want of jurisdiction of the court which rendered it. *Potter* v. *Whitten*, 161 Mo. App. 118, 131-32; *Nevatt* v. *Springfield Normal School*, 79 Mo. App. 198, 201; *Reid, Murdock & Co.* v. *Mercurio*, 91 Mo. App. 673, 678. The Missouri Supreme Court has never disapproved these decisions.

The court of appeals below in deciding that the cause should be litigated in the present suit declared, 121 F. 2d at 778:

"A federal court may not refuse to assume jurisdiction merely on the ground that another remedy is available or because another suit is pending, if the controversy between the parties will not necessarily be determined therein. Maryland Casualty Co. *v.* Consumers Finance Service, Inc., 101 F. 2d. 514."

Here it is evident, despite the diligence of counsel, that the ability of respondent to assert its cause of action in the Missouri garnishment proceeding is uncertain and must remain so until the Supreme Court of Missouri has spoken. Just how respondent's ability to maintain its suit in Missouri can be made more certain or even reasonably probable, or how the cause of justice will be advanced by compelling respondent to begin over again the nearly three years' course of litigation which it has now traveled, is not revealed. The concededly erroneous decision of the district court has been reversed by the circuit court of appeals. Unless this Court is now prepared to say that respondent's ability to maintain the

suit in the state court is free from doubt, we should leave the judgment undisturbed and not deny to respondent the benefit of the federal jurisdiction which Congress has sanctioned. One of the chief purposes of creating the diversity of citizenship jurisdiction was to afford to suitors an unclouded opportunity to assert their rights in the federal courts when the exigencies of state court jurisdiction of subject matter or parties, or both together as in this case, render doubtful their ability to proceed in the state courts. In such a case a suitor ought not to be penalized, as respondent plainly is, for invoking the federal jurisdiction.

The Missouri law, if not conclusively against the assertion of the present cause in the Missouri garnishment proceeding, is at least so doubtful that respondent ought not to be compelled to seek the futile prophecy of the district court in Kansas as to how the Missouri courts will resolve an unsettled point of Missouri practice. Since petitioner has failed to sustain his burden of showing that the case is a proper one for dismissal, the district court should exercise its jurisdiction by proceeding to determine the merits without further delay. If this litigation is ever to end, it is important for it to get started.

Mr. Justice ROBERTS and MR. Justice JACKSON join in this dissent.